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IN THE

Supreme Court of the United States

October Term, 1991

LEO J. SONNENBURG, GERALD HARNETT AND DENNIS SHEFFIELD,

Petitioners,

v.

EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA AND JERRY THADEN, COMMISSIONER OF THE INDIANA DEPARTMENT OF MENTAL HEALTH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Thirteenth Amendment's ban on involuntary servitude permit states to meet their labor needs by forcing patients in their institutions for the mentally ill or the mentally retarded to work full-time without pay under threats of delayed release, solitary confinement and electric shock?

2. Upon proof of a Thirteenth Amendment violation, may a state court nonetheless refuse to award damages in restitution for the unpaid labor, despite the lack of any other remedy?

3. Where forced, unpaid labor by state mental patients was subject to the congressionally enacted minimum wage law both during the years the labor was performed (1970-74) and throughout the time of trial and appeal (1987-91), may a court retroactively resurrect and apply the intervening, and since overruled, 1976 decision in *National League of Cities* to override that congressional enactment?

4. Do the principles of state sovereignty enunciated in *National League of Cities*, before its 1985 overruling by *Garcia*, mean that Congress is powerless to prevent a state from forcing mental patients to work in its mental institutions without any compensation?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the Indiana Patient Remuneration Board was listed in the caption of the decision below, even though that agency has not existed for some years.

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OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported at 573 N.E.2d 398 and is reprinted as Appendix A. The opinion of the Court of Appeals of Indiana, Third District, is reported at 542 N.E.2d 201 and is reprinted as Appendix B. The judgment of the Jasper Circuit Court is reprinted as Appendix C. The earlier opinion of the Court of Appeals, Third District, is reported at 411 N.E.2d 390 and is reprinted as Appendix D. The order of the Indiana Supreme Court denying rehearing is reprinted as Appendix E.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on June 12, 1991. A timely petition for rehearing was denied on September 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Thirteenth Amendment to the United States Constitution provides in relevant part:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States.

The relevant portions of the Fair Labor Standards Act are set forth in Appendix F.

STATEMENT OF THE CASE

Indiana's Compulsory Patient Work Regime.

Petitioners were patients in Indiana state hospitals for the mentally ill and mentally retarded. They were committed to those hospitals, some voluntarily, some involuntarily, for care and treatment, *not* as "punishment for [any] crime[s]." U.S. Const., Amend. XIII, § 1.

Since statehood, Indiana used unpaid patient labor to operate, maintain, and sometimes even construct state institutions for the

mentally ill and the mentally retarded. (A26-28).[1] In 1971, the Indiana General Assembly confronted this practice by passing, over the Governor's veto, "An Act relating to the elimination of *peonage* in state institutions of the mentally ill and mentally retarded, establishing a remuneration for services of such patients . . . ." 1971 Ind. Acts 2124 (Pub.L.No. 474) (emphasis added).[2] That state law, however, did not succeed in ending the peonage it addressed.

There was a severe labor shortage in Indiana during the early 1970's (Tr. 1194E, 1736),[3] and the rate of use of unpaid patient labor in state mental institutions tracked the fluctuating availability of labor in the counties where those institutions were located. (Tr. 1728-29, 1731, 1735, 1736, 1753). As the Indiana Supreme Court noted in the decision below, Indiana carefully marshalled its patient work force, deciding "to divide the tasks, specialize the labor and take advantage of economies of scale . . . ." (A29). Patients "performed a variety of work activities while hospitalized" (A21), "mostly low-skill, manual labor" (A36), including preparing and serving meals, washing dishes, mowing the grass, washing laundry, scrubbing floors and other janitorial work, bathing and feeding bedridden patients, cutting other patients' hair in the barber and beauty shops, repairing vehicles in the hospital garage, maintaining the hospital bowling alley, operating the hospital's power, water and sewage treatment facilities, and doing secretarial and clerical work in the institution's offices. (A21). Patients worked eight hours a day, five days a week, in addition to the routine personal housekeeping tasks for which each patient was responsible. (A21). This patient labor was supervised not by mental health professionals but by hourly-wage staff employees assigned to the work station in question, such as the groundskeeper, janitor or cook. (Tr. 1679). Staff reports on patient workers related not to concerns of medical or psychological therapy but only to normal employer concerns such as punctuality and productivity. (Tr. 1988-89). This unpaid labor

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[1] Citations to the appendices printed with this petition will be styled "A___".

[2] This law is not at issue because, as the Indiana Supreme Court ruled, the patient remuneration schedule necessary to implement the law "never went into effect." (A9).

[3] Citations to the transcript of the trial will be styled "Tr.___".

was far from voluntary. On the contrary, patients were routinely compelled to work without pay by fear of punishment, including loss of privileges, delayed release from the institution, confinement in an isolation room, and electric shock. (A31-32).

The Proceedings At Trial and On Appeal.

In 1974, two patients, Leo Sonnenburg and Gerald Harnett, filed this class action against the Governor of Indiana and the Commissioner of the Department of Mental Health in their official capacities, seeking compensation for labor performed from 1970-1974 while they were confined to state mental institutions. Plaintiffs sought relief under the Involuntary Servitude Clause of the Thirteenth Amendment and the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206, 207. Congress had extended the FLSA to state mental hospitals in 1966. Fair Labor Standards Amendments of 1966, Pub.L. No. 89-601, § 102(b), 80 Stat. 830, 831 (1966). That amendment was upheld by this Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968).

In 1976, several years after the plaintiffs' unpaid labor took place, this Court overruled *Wirtz* in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and held that the Constitution prohibited the application of the FLSA to many state employees. Plaintiffs amended their complaint to remove the FLSA claim. (A2).[4] In 1980, the trial court certified a class of all patient workers who labored in Indiana mental institutions from May 23, 1970 to December 31, 1974. The class totalled 7,419 individuals. (A2).[5] In 1985, after this Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), plaintiffs were granted leave, over defendants' objection, to amend their complaint to reassert their FLSA claim. (A2).

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[4] Plaintiffs also added a state law claim for unjust enrichment.

[5] In 1978, the trial court had previously certified the plaintiff class and granted it partial summary judgment under Indiana's patient remuneration law. (The plaintiffs had amended the complaint to add that claim and to include the Indiana Patient Remuneration Board as a defendant in March of 1976). (A2). That class determination and partial judgment were reversed on appeal and the cause was remanded to the trial court. *See* Appendix D.

The case was tried to the bench in 1987.[6] The court heard evidence on the coercive environment in which patients were compelled to labor. Former patients testified that refusal to work, like other forms of disobedience, would be punished by a loss of privileges, including recreation and visitation (Tr. 1258, 1337, 1357, 1413), or by being stripped of one's clothing and locked up in a windowless isolation cell, which contained only a mattress and a toilet or bucket. (Tr. 1204, 1337, 1354, 1412). Involuntarily committed patients were told that if they refused to work, their release from the institution would be delayed: they "had to work in order to gain [their] freedom." (Tr.1200-01). Other patients testified that a refusal to work at assigned jobs could result in being heavily sedated with drugs (Tr. 1204, 1338, 1355) or being subjected to electric shocks. (Tr. 1375-76, 1413).

Expert witnesses for both the plaintiffs and defendants testified that for a work program to be therapeutic, it must be supervised by mental health professionals and must involve carefully documented treatment plans. (Tr. 1591-92, 1594, 1600, 1660-61, 1678-79, 1921, 1944). The defendants' own witnesses confirmed that the work assignments and supervision at issue did not satisfy the minimum requirements of the agreed-upon therapeutic model (Tr. 1949, 1959-60, 1987-89), and that not paying the patients for their work could actually impair therapeutic goals and treatment. (Tr. 1995-96). Indeed, some patient records revealed work assignments that directly contradicted the instructions of the treating physician (Tr. 1999) or that patently placed the institution's demand for labor above the patient's welfare, such as the case of a woman with a broken arm -- still in a sling -- who was nevertheless required to work 40 hours a week scrubbing floors. (Tr. 1352-56). Another female patient testified that she was told she had been assigned to work as a "trustee" escorting patients throughout the complex because she was infertile: "So if anybody grabs you and rapes you you won't get pregnant." (Tr. 1259).

Depositions of staff employees of the mental institutions made clear that the primary reason for patient labor was that the institu-

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[6] During trial, plaintiffs introduced a new count based on Art. I, § 21 of the Indiana Constitution (just compensation for particular services) and invoked 42 U.S.C. § 1983 to allege violations of the Thirteenth and Fourteenth Amendments, the FLSA, and the federal anti-peonage statute, 42 U.S.C. § 1994. (A3).

tions had trouble paying for enough staff at market rates. (Tr. 1599). Under questioning by the court, defense witnesses testified that patients were also kept working simply to avoid idleness, on the theory that "behavior control" was in itself therapeutic (Tr. 1945-52), with the explanation that Indiana mental institutions deemed *all* labor to be "therapeutic" for their patients in the same sense that the Indiana Bureau of Corrections deemed the making of license plates to be "therapeutic" for its prison inmates. (Tr. 1952-53). The district court concluded that the patients' medical records could not sustain a finding that work assignments in Indiana mental institutions were a form of medical therapy. (Tr. 1941).

On November 17, 1987, the trial court rendered a general judgment for the plaintiffs because neither party had requested findings of fact or conclusions of law pursuant to Indiana Rule of Trial Procedure 52(a). (A64). It is undisputed that the plaintiff class performed over 8.7 million hours of uncompensated labor from 1970-1974. Multiplying that figure by an hourly wage of $1.60 (29 U.S.C. § 206 (1970), A94), and with an equal amount added for prejudgment interest, the total judgment came to nearly $28 million. (A3).

The Indiana Court of Appeals affirmed, holding that plaintiffs were entitled to just compensation for their labor pursuant to Art. I, § 21 of the Indiana Constitution; the court did not reach the Thirteenth Amendment and FLSA claims at issue here. The court disallowed the award of prejudgment interest, thus halving the judgment to approximately $14 million. (A57).

The Decision of the Indiana Supreme Court.

The Indiana Supreme Court granted the parties' petitions for transfer and vacated the opinion of the Court of Appeals. (A4). The Indiana Supreme Court noted that "the trial court's general judgment must be affirmed if it is sustainable on any theory supported by the record." (A4-5). Two of those theories are relevant to this petition: the Thirteenth Amendment and the FLSA.[7]

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[7] This petition does not raise the remaining four theories of recovery advanced by plaintiffs at trial and considered by the Indiana Supreme Court: (1) the Civil

Relying on this Court's precedents, the Indiana Supreme Court held that petitioners were entitled as a matter of law to sue directly under the Thirteenth Amendment for relief from involuntary servitude. (A18). Turning to the merits, the court announced that in reviewing the general judgment awarded to the plaintiffs, it would "consider only the evidence most favorable to the prevailing party along with all reasonable inferences to be drawn from it." (A5 n.5). Accordingly, the Indiana Supreme Court did not question in any way the *factual* basis for petitioners' involuntary servitude claim.

There is no dispute that the plaintiff class performed 8,735,891 hours of uncompensated labor. Nor is there any doubt that this servitude was involuntary. Although none of the eleven members of the class who testified at trial had ever refused to work and suffered consequent punishment, the Indiana Supreme Court, "[c]onsidering the impaired mental condition of the plaintiffs and the extent of the State's control over the patients' lives," confirmed that patient compliance was guaranteed by the coercive institutional environment. (A32)(*see also* A32 n. 24). Involuntarily committed patients "could reasonably believe that a refusal to work might result in a delayed release from the institution." (A31-32). The court noted the testimony of one civilly committed patient who was told that he "'had to work in order to gain [his] freedom.'" (A32 n.23) (brackets in original). And, "[w]ith respect to voluntary committees, the persistent rumors that disobedience of any kind was punished with a loss of privileges, isolation, and electric shock created a coercive atmosphere that reasonably led patients to believe that they were not free to refuse to work." (A32).

It is equally beyond dispute that the labor performed by petitioners under threat of physical confinement and electric shock cannot be deemed treatment or therapy administered by the state's mental institutions. The Indiana Supreme Court confirmed that Indiana organized and treated its mental patients as a work force, "to divide the tasks, specialize the labor and take advantage of economies of

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Rights Act, 42 U.S.C. § 1983; (2) Indiana's patient remuneration statute; (3) Art. I, § 21 of the Indiana Constitution; and (4) unjust enrichment.

scale . . . ." (A29).[8]

Yet the court below rejected petitioners' Thirteenth Amendment claim, holding -- in conflict with the decisions of many other jurisdictions -- that the Constitution's ban on involuntary servitude is *wholly inapplicable* to forced labor by the mentally retarded and the mentally ill, regardless of what sort of relief is sought. (A19-20). Indeed, the Indiana Supreme Court held that being forced to engage in institutional manual labor under threat of solitary confinement and electric shock is a "civic duty" a state may freely demand of *all* citizens, just like service on a jury, as a material witness, or in the militia. (A19-20). The court below then held that even if petitioners *had* made out a valid claim of involuntary servitude under the Thirteenth Amendment, that Amendment, unlike the Fourth and Fifth Amendments to the Constitution, would not support an action for damages -- even if no other relief is available. (A20-21).

In denying plaintiffs' petition for rehearing on September 17, 1991, the court below further concluded that, in any event, no Thirteenth Amendment claim would lie on behalf of members of the plaintiff class who had "requested voluntary commitment to the state's institutions. Surely these voluntary patients cannot be said to have been subjected to involuntary servitude." (A93).

With respect to petitioners' claim under the minimum wage provisions of the FLSA, the Indiana Supreme Court conceded that the statute applied to state mental hospitals during the years in question, 1970-1974, because Congress had so extended the law in 1966 and that extension had been upheld by this Court in *Maryland*

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[8] Although the court below did not dispute the trial court's conclusion that medical records failed to support the notion that patient labor was a form of therapy, *see* pages 4-5, *supra*, the court did note that forcing the patients to work provided some other benefits for the patients and the state's institutions. "When the State refused to allow any mental patients to be assigned work between 1976 and 1977, the hospitals experienced a rise in the number of violent patient incidents, amount of tranquilizers prescribed, and the average patient stay." (A30). Aside from suggesting that the hospitals failed to provide adequate medical, social and recreational therapy to treat and to occupy their patients during those years, this evidence only confirms that the forced labor program at issue here, as the state's own witnesses testified, was "therapeutic" only in the sense that the patients were worked so hard that they had neither the time nor the energy to get into trouble. *See* page 5, *supra*.

v. Wirtz. (A9).[9] The court below further reasoned that "[c]ourts applying federal law must apply the law in effect at the time they decide a case," and therefore "plaintiffs' FLSA claim must be decided based on the *Garcia* decision . . . ." (A11). The court then held, nevertheless, that *Garcia v. Metropolitan Transit Authority* should not be applied retroactively, and that this non-retroactivity ruling did *not* refer the court back to the FLSA as applied in 1970-1974, but that it instead resurrected the interim 1976 decision in *National League of Cities v. Usery*, which should *now* be applied retroactively, even though that decision was overruled in *Garcia* in 1985. (A11-14). The Indiana Supreme Court thus held that petitioners' FLSA claim is controlled not by the law that governed at the time of the forced labor (1970-1974), nor by the law that governed during trial and appeal (1987-1991), but by the "retroactive" application in 1991 of a case overruled in 1985.

The court below then simply assumed that the principles of state sovereignty enunciated in *National League of Cities* dictate that forcing mental patients to operate and maintain state mental institutions without pay, under threats of confinement and electric shocks, is part of a state's traditional right to structure integral governmental operations.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES AN UNPRECEDENTED, UNPRINCIPLED AND POTENTIALLY UNBOUNDED EXCEPTION TO THE THIRTEENTH AMENDMENT'S BAN ON INVOLUNTARY SERVITUDE.

The Indiana Supreme Court held that the Thirteenth Amendment is simply inapplicable to forced patient labor in mental institutions. (A19-20). That remarkable holding applies to a situation that has

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[9] The claim under the FLSA's maximum hours or overtime provisions that plaintiffs had advanced below is no longer in issue. (A10). The judgment awarded to petitioners after trial was calculated solely on the basis of a minimum wage rate, and that minimum wage claim is presented in this petition.

recurred too often, and in too many guises, in American history to be dismissed as having no continuing import -- and it conflicts with decisions from at least twelve other jurisdictions, all of which have recognized that the Thirteenth Amendment *does* extend to involuntary servitude in mental institutions.[10] This conflict requires

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[10] *See, e.g., Jobson v. Henne*, 355 F.2d 129, 132 & n.3 (2d Cir. 1966)(Thirteenth Amendment is violated if a mental institution requires patients to perform hospital work with no therapeutic purpose and that is not related to personal housekeeping or hygiene); *Arahovitis v. State*, 466 N.Y.S.2d 928, 930 (Ct.Claims 1983)(patient compelled to work full-time as hospital barber awarded damages for "involuntary servitude"); *Buzzelle v. Colorado State Hospital*, 491 P.2d 1369, 1371 (Colo. 1971)(en banc)(involuntary patient labor allowed under Amendment only if part of "therapeutic program of rehabilitation"); *Matter of S.C.*, 790 S.W.2d 766, 774 (Ct.App.Tex. 1990)(distinguishing incarcerated violent juvenile offenders from "persons civilly committed to mental institutions who are protected by the Thirteenth Amendment"); *Stone v. Paducah*, 86 S.W. 531, 533 (Ct.App.Ky. 1905)("idiots, insane persons and inebriates" in state institutions who have not been convicted of any crime "cannot be compelled to labor, for such would be involuntary servitude and in violation of . . . the Thirteenth Amendment"); *United States v. Lewis*, 644 F.Supp. 1391, 1400 (W.D.Mich. 1986)("in recent years the courts have extended the protection of the Thirteenth Amendment to patients in mental institutions"), *aff'd sub nom. United States v. King*, 840 F.2d 1276 (6th Cir.), *cert. denied*, 488 U.S. 894 (1988); *Santiago v. Philadelphia*, 435 F.Supp. 136, 157 (E.D.Pa. 1977)("courts have recognized a claim under the Thirteenth Amendment in cases of civil commitment to mental health institutions"); *King v. Carey*, 405 F.Supp. 41, 44 (W.D.N.Y. 1975)("Those civilly committed to mental institutions are protected by the Thirteenth Amendment."); *Bobilin v. Bd. of Education*, 403 F.Supp. 1095, 1100 (D.Hawaii 1975)("A mental institution . . . is more likely to be the source of abuse in the Thirteenth Amendment context because of the nature of the custodial situation. Patients more often than not are institutionalized and forgotten"); *Weidenfeller v. Kidulis*, 380 F.Supp. 445, 450 (E.D.Wis.-1974)("forced labor of certain individuals, including the mentally disabled, amounts to involuntary servitude and therefore is violative of the Thirteenth Amendment"); *Downs v. Dept. of Public Welfare*, 368 F.Supp. 454, 465 (E.D.Pa. 1973)("Amendment has applicability in the mental health institution context"); *Downs v. Dept. of Public Welfare*, 65 F.R.D. 557, 559 (E.D.Pa. 1974)(approving consent decree eliminating "peonage" in state hospitals); *Wyatt v. Stickney*, 344 F.Supp. 373, 376, 381 (M.D.Ala. 1972)(forbidding involuntary, unpaid patient labor "which involves the operation and maintenance of the hospital" and any other type of labor which is not part of an integrated therapeutic treatment plan supervised by mental health professionals), *aff'd in part and remanded in part on other grounds sub nom. Wyatt v. Aderholt*, 503 F.2d 1305, 1310, 1311 (5th Cir. 1974); *Parks v. Ciccone*, 281 F.Supp. 805, 811 (W.D.Mo. 1968)(under Amendment, federal medical center "does not have the right to have unconvicted inmates perform work unless the inmate wishes to do so"); *Johnston v. Ciccone*, 260 F.Supp. 553, 556 (W.D.Mo. 1966)("Assuming that petitioner 'has never been convicted of a crime', if petitioner is being forced to work at the Medical Center his constitutional rights are being violated."); *Tyler v. Harris*, 226 F.Supp. 852,

resolution by this Court.

That the practice upheld below, while perhaps peculiar, is neither more nor less so than the "peculiar institution" of chattel slavery itself is betrayed by the fact that this case squarely fits the analytical framework established by the corpus of Thirteenth Amendment precedent. A valid claim of involuntary servitude in mental hospitals has, until now, been established upon proof that: (1) the patient worked involuntarily; (2) the chores were not limited to the patient's personal "housekeeping" or hygienic needs, but extended to maintenance and operating tasks that defray institutional costs; and (3) the work was not reasonably related to a plan of appropriately supervised therapy for the individual patient. *See Jobson*, 355 F.2d at 131-32 & n.3; *Arahovitis*, 466 N.Y.S.2d at 930; *Weidenfeller*, 380 F.Supp. at 450-51; *Wyatt*, 344 F.Supp. at 381.

All of these tests were plainly met here, as the Indiana Supreme Court's own opinion confirms. *First*, the court below agreed that these petitioners toiled in a "coercive atmosphere" under reasonably and widely held fears that refusal to work would be punished by "delayed release from the institution," "loss of privileges, isolation, and electric shock." (A31-32).[11]

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855 (W.D.Mo. 1964)(compulsory work by unconvicted hospital inmate constitutes involuntary servitude). *Cf. Bell v. Wolff*, 496 F.2d 1252, 1254 (8th Cir. 1974)(unconvicted pre-trial detainee in state prison was "subjected to involuntary servitude" because alternative to his signing of work consent form was confinement in "administrative segregation" cell).

The Indiana Supreme Court's brief attempt to distinguish four of these cases was wholly unavailing. (A20). *Jobson* was inexplicably dismissed as "a § 1983 case," as if the statutory basis for jurisdiction somehow negated the Second Circuit's exegesis on the Thirteenth Amendment. *Arahovitis* was dismissed because it did not explicitly cite and quote the Amendment, despite the fact that it rested its award of damages for "involuntary servitude" squarely on explicit Thirteenth Amendment precedents such as *Jobson*. Similarly, *Wyatt* was dismissed on the grounds that the Amendment supposedly "was not at issue," even though the case has been widely cited as a Thirteenth Amendment precedent and even though the order entered and affirmed in that case set forth a detailed description of prohibited hospital labor practices. Finally, the court below deemed *Weidenfeller* inapposite because the defendants there "were private hospitals," even though the Thirteenth Amendment's prohibition of involuntary servitude applies to state actors and private parties alike, thus rendering the court's supposed distinction meaningless. *See Civil Rights Cases*, 109 U.S. 3, 23 (1883).

[11] In its order denying rehearing, the court below sought to distinguish involuntarily committed patients from those who "requested voluntary commitment to the state's institutions. Surely these voluntary patients cannot be said to have been

Second, the court below confirmed that Indiana carefully regimented and deployed its patient work force to take advantage of economies of scale (A29), and that, in addition to their own personal housekeeping responsibilities (such as making one's bed), petitioners staffed thirteen different institutional job requirements on a full-time basis, including janitorial, food service, and maintenance tasks. (A21). The use of patient laborers to supplant regular hospital staff in such roles increased when local labor shortages made hiring hourly-wage employees difficult. *See* page 2, *supra*.

Third, the evidence at trial revealed that the full-time jobs assigned to petitioners -- on the basis of institutional rather than personal needs, as just explained -- could not be deemed "therapy" by any stretch of the imagination, and the court below did not disturb that conclusion, *see* pages 6-7 and note 8, *supra*, nor did it rely on any therapy exception in holding the Thirteenth Amendment inapplicable in this case.[12] Indeed, the Indiana Supreme Court's

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subjected to involuntary servitude." (A93). The theory of the Indiana Supreme Court seems to be that even though their actual labor was induced by fear of being locked up naked in a barren isolation cell or wired up for electric shocks, such patients were irrevocably bound by their initial decision to enter the institution, which constituted consent to anything and everything the institution might later demand of them. Leaving aside the radical and undocumented assumption that hospital admission indeed constitutes such "consent," the right secured by the Thirteenth Amendment is *inalienable*. This Court's peonage cases established that the Thirteenth Amendment does not countenance involuntary servitude, regardless of contract or prior consent. *Bailey v. Alabama*, 219 U.S. 219, 242-43 (1911); *Clyatt v. United States*, 197 U.S. 207, 215-16 (1905); *United States v. Shackney*, 333 F.2d 475, 484 & n.13 (2d Cir. 1964)(Friendly, J.).

Even if this Court could rest assured that forced patient labor is now or will soon become a thing of the past -- which it cannot -- the holding that all who voluntarily enter an institution where such practices are condoned thereby forsake their Thirteenth Amendment rights is independently outrageous and can hardly be confined to the factual context of this case.

[12] Leaving aside for the moment the fact that patients have a right to refuse particular forms of "treatment," whereas petitioners had no choice but to work, the trial court's rejection of the state's "therapy" contention is consistent with other decisions that have rejected defenses grounded on supposed "occupational" or "industrial" therapy. *Cf. Arahovitis*, 466 N.Y.S.2d at 930 ("We are unable to discern how coerced employment in a barbershop is designed to restore the mental faculties of one deemed unfit to stand trial. We note that while performing his labors claimant was not supervised by mental health professionals but by barbers, whose presence underscores the work-oriented nature of the activity. . . . The fact [that claimant's hospital record states] that claimant was 'adjusting' does not add a therapeutic gloss to his work. He could just as well have been adapting to his

defense of mental patient peonage as a "civic duty" demonstrates that Indiana itself does not genuinely treat its patient work requirements as "therapy."

The Indiana Supreme Court did not dispute that, if these legal standards were applied, a valid claim of involuntary servitude would be established. Instead, it simply repudiated this entire body of precedent. The *only* basis invoked by the court below for rejecting the application of the Thirteenth Amendment to forced patient labor is the so-called "'civic duty' exception." (A19). *See, e.g., Hurtado v. United States*, 410 U.S. 578 (1973)(Amendment does not apply to compelled service as material witness); *Selective Draft Law Cases*, 245 U.S. 366 (1918)(compulsory military service). According to the Indiana Supreme Court, continuous, full-time menial labor in a state mental hospital, under threat of delayed release, confinement in a barren isolation cell, drug sedation and electric shocks -- a regime the Indiana General Assembly itself labelled "peonage" -- is just another civic duty that the state occasionally demands of all of its citizens, like service on a jury. It is little wonder that no other court has ever endorsed this extraordinary premise -- a premise that warrants review of this decision lest the newly enlarged "civic duty" exception swallow the rule against involuntary servitude.

The narrow "civic duty" exception supported by the precedents merely embodies this Court's recognition that the Thirteenth Amendment was meant to ensure "liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." *Butler v. Perry*, 240 U.S. 328, 333 (1916). Accordingly, jury duty, appearance as a witness in court, and military service, even under threat of criminal sanction, are all "public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned." *Hurtado*, 410 U.S. at 589. Compensation is not required in such cases because the state need not "pay for the performance of a public duty it is already owed." *Id.* at 588.

But no characterization of continuous, full-time, forced menial labor in a mental institution could possibly fit the classic definition

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coercive environment.").

of "civic duty."[13] Jury duty and military service, however burdensome, are not involuntary servitude because they are the obligations of free citizens, the inescapable conditions of liberty under law. In contrast, patient labor is neither a service to the state that guarantees civil liberty nor an unavoidable element of self-government. Petitioners were forced to operate and maintain state hospitals for the insane and the retarded during years when local labor shortages raised the costs of hiring hourly wage employees. Patient slave labor was a contribution to the institution's operating needs and budget, not "'a part of the necessary contribution of the individual to the welfare of the public.'" *Hurtado*, 410 U.S. at 589.

The requirement of a few days of labor a year on local roads that this Court sustained in *Butler v. Perry* in 1916 cannot be stretched to include this case.[14] Mental patient peonage is full-time institutional labor, not a minor, occasional state demand. The state is not free to dragoon law-abiding citizens off the streets to work full-time, without pay, scrubbing toilets or cooking meals in the statehouse cafeteria, for indefinite periods that may last decades, just because the state may need such services and would rather not pay the

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[13] Such compulsory, unpaid labor in a different sort of state institution – a prison – is excluded from the Thirteenth Amendment's purview not by the civic duty exception but by the Amendment's own words. This Court has often looked to the provision allowing "involuntary servitude . . . as a punishment for crime" for guidance in interpreting the rest of the Amendment. *See United States v. Kozminski*, 487 U.S. 931, 942 (1988); *Slaughter-House Cases*, 83 U.S.(16 Wall.) 36, 69 (1873). The Framers evidently concluded that, without such an explicit exception, coerced labor by convicts in state institutions would amount to involuntary servitude. This suggests that coerced labor by *un*convicted persons confined to other state institutions – mental facilities – is likewise involuntary servitude. The Amendment contains no provision exempting this practice even though, as the Indiana Supreme Court itself points out, it was common long before the adoption of the Thirteenth Amendment. (A26-27).

[14] Moreover, the road work at issue in *Butler* was not strictly required. It was merely one alternative: citizens could also fulfill their legal obligation by finding a substitute laborer or by paying a $3 assessment to the local "road and bridge fund." 240 U.S. at 329-30. Thus *Butler* in fact sustained little more than a tax obligation. Surely a citizen's duty to pay state taxes cannot justify reducing that citizen to involuntary servitude as soon as he is committed to a state institution, especially given that Indiana forced *all* its mental patients to work, regardless of whether they, their families or their estates were paying the costs of institutionalization. *See* A29 (Indiana Supreme Court noting that, in addition to forced labor, "[t]he State also requires patients with financial resources to pay for the cost of their care."); Tr. 1254-57 (paying, voluntarily committed patient forced to work).

market wage necessary to attract voluntary employees.[15] If the "civic duty" exception were that broad, states would be free to re-introduce slavery itself so long as they were careful to call it "conscription for public service."

Unlike the civic duties this Court has sustained as beyond the reach of the Thirteenth Amendment, the burden of Indiana's self-described regime of mental patient "peonage" is hardly shared equally among all citizens, and indeed is not even imposed pursuant to any *law*.[16] Nor does the Indiana Supreme Court's implicit *quid pro quo* argument, that the patients' labor offsets the cost of their institutionalization (A29-30, A37-38), transform involuntary servitude into the fulfillment of a civic obligation. Even if the patients owed a debt to the state -- which is certainly not true for patients who paid for their hospitalization, *see* note 14, *supra* --

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[15] Nor can support for Indiana's patient labor system be justified by invocation of "services which have from time immemorial been treated as exceptional," *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897)(seamen may be compelled to complete voyage with ship). (A19). Forbidding sailors to jump ship is necessary because "the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment or leave her at some place where seamen are impossible to be obtained," *Robertson*, 165 U.S. at 283. As the Court subsequently explained, this holding involves only the state's power "to make unlawful and punish criminally an abandonment by an employee of his post of labor in any extreme cases." *Bailey v. Alabama*, 219 U.S. at 243. Thus, lifeguards may not sit back and watch people drown and railway switchmen are not free to abandon their posts. But this police power has no relevance here -- Indiana's mental hospitals did not founder or sink when the state hired regular employees to replace patient laborers in the wake of this lawsuit. In any event, it is doubtful that the shanghaiing of sailors upheld in *Robertson* is still good law. *Cf. Elman v. Moller*, 11 F.2d 55, 57 (4th Cir.)(awarding damages for "involuntary servitude" to sailor restrained on ship), *cert. denied*, 271 U.S. 675 (1926).

[16] Unlike military service and all of the other duties ever held by this Court to fall within the "civic duty" exception to the Thirteenth Amendment, the Indiana Supreme Court's mental patient labor "duty" does not appear to be enshrined in any statute or ordinance -- certainly the court below cited none in its ruling on this issue. (A19-20). Indeed, when the Indiana legislature addressed this forced labor regime in 1971 it denounced it as "peonage." *See* page 2, *supra*. Moreover, it is a weird sort of "civic duty" that is enforced not by threat of criminal prosecution (e.g., for failing to comply with the military draft), nor by any judicial law enforcement process whatsoever, but by threats of physical imprisonment (in an isolation cell) or physical torture (electric shocks) inflicted by low-level state hospital employees. In truth, the Indiana Supreme Court's "civic duty" is a *post hoc* rationalization cut from whole -- and rather tawdry -- cloth.

forcing them under threat of physical confinement and physical torture to perform personal labor to satisfy that debt is just another form of peonage long outlawed.

The decision below completely banishes the guarantees of the Thirteenth Amendment from the inherently coercive world of mental institutions, which usually operate out of the light of public scrutiny. If the Thirteenth Amendment can be banished there, it can be banished anywhere. The Indiana Supreme Court has held that the mentally retarded and the mentally ill cannot invoke the ban on involuntary servitude to seek *any* form of relief -- whether declaratory, injunctive, damages, or *habeas corpus* -- regardless of how they are subjugated or exploited by state institutions. The Court should grant the writ to avert this travesty and to resolve the conflict on this issue among the state and lower federal courts.

II. THE DECISION BELOW, IN TENSION WITH RECENT DECISIONS OF THIS COURT, DENIES ALL VICTIMS OF SLAVERY OR INVOLUNTARY SERVITUDE ANY RESTITUTION FOR THE FORCED EXPROPRIATION OF THEIR LABOR AND THEREBY RENDERS THE THIRTEENTH AMENDMENT VIRTUALLY UNENFORCEABLE.

Not content to reject petitioners' Thirteenth Amendment claim on the merits, the Indiana Supreme Court went on to hold that, in any event, petitioners had no right to damages from a state in a suit brought directly under the Thirteenth Amendment.[17] That holding merits review *independent* of the risk that forced mental patient labor is still, or will again become, a widespread abuse, for it makes an invitation that cannot be contained within the four walls

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[17] At the 1987 trial, petitioners also pressed an independent claim under 42 U.S.C. § 1983 premised on various federal constitutional and statutory grounds. The Indiana Supreme Court dismissed this claim on the authority of this Court's subsequent decision in *Will v. Michigan Department of State Police*, 491 U.S. 58, 70-71 (1989), which held that state officials acting in their official capacities are not "persons" within the meaning of § 1983 and thus are not subject to §1983 damage suits for deprivations of constitutional rights. (A6).

of the mental hospital setting. The decision below in effect tells Indiana and other states that they can forcibly exact labor with no fear whatsoever that they will ever have to pay even a dime in compensation, let alone the full value of the services or any damages for violations of personal liberty. If a state can overcome whatever efforts to obtain *habeas corpus* or injunctive relief its enslaved victims are able to mount, then that state is free to act with impunity -- and "then the Thirteenth Amendment [will have] made a promise the Nation cannot keep." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

Yet -- in part to avoid the perverse incentive structure such a rule would create -- recent constitutional decisions of this Court make plain that states may be held liable to provide restitution for property confiscation governed by the Takings Clause of the Fifth Amendment and for taxation that violates the Commerce Clause. This Court should grant the writ with respect to this issue as well as the first because the Indiana Supreme Court has created a conflict among the lower courts, trivialized the Thirteenth Amendment, and created an illegitimate and constitutionally unwarranted distinction between a person's right to the value of her *physical property* and her right to the value of her *personal labor*.

Interpreting decisions of this Court, the Indiana Supreme Court correctly acknowledged that, although "suits attacking the 'badges and incidents of slavery' must be based on statute, suits attacking compulsory labor itself may rest on the Thirteenth Amendment." (A18).[18] Yet the court below, claiming that the "few actions brought directly under the amendment have sought either writs of *habeas corpus* or declaratory judgments" (A20), nevertheless held that persons injured by state violations of the Thirteenth Amendment are not thereafter entitled to recover damages. (A21). In fact, several decisions cited by the court below have sustained (and even awarded monetary relief in) actions seeking damages under the Thirteenth Amendment.[19] The decision below thus creates a

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[18] The court below relied on the *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Slaughter-House Cases*, 83 U.S. 36, 69, 71-72 (1873); *Butler v. Perry*, 240 U.S. 328, 332 (1916); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968); *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971).

[19] *See Arahovitis v. State*, 466 N.Y.S.2d 928, 930 (N.Y.Ct.Cl. 1983)(awarding former mental patient damages against state institution -- restitution for his unpaid

conflict among lower courts on this independently important issue.

The Indiana Supreme Court noted that this Court has held that "damages may be obtained for direct violations of other constitutional amendments, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395-97 (1971) (Fourth Amendment), and *Davis v. Passman*, 442 U.S. 228, 245-48 (1979) (Fifth Amendment Due Process Clause)," but refused to recognize such a damage remedy under the Thirteenth Amendment. (A20-21). The court below invoked the wrong line of authority. *Bivens* and *Davis* involved questions of whether federal government officials can be held individually and personally liable for damages in federal actions premised directly on constitutional provisions. This Court need not determine in this case whether a *Bivens* remedy against federal officials is available for Thirteenth Amendment violations. Instead, the issue is whether individuals can sue *state* officials in their *official* capacity -- in essence the state itself [20] -- in *state* court to obtain compensation for unconstitutional involuntary servitude. An affirmative answer is indicated by the analysis this Court embraced in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990). These decisions demonstrate that when a state is sued in its own courts for unconstitutionally expropriating something of value from a private party, the Constitution requires not only prospective relief but also restitution for past wrongs.

First English Evangelical Lutheran Church involved a county ordinance that barred reconstruction of buildings in a flood plain where the church had operated and wished to rebuild a camp for

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labor -- under authority of Thirteenth Amendment precedents); *Weidenfeller v. Kidulis*, 380 F.Supp. 445, 450-51 (E.D.Wis. 1974)(allowing mentally retarded patient to sue private institution for damages under the Thirteenth Amendment). *See also Downs v. Dept. of Public Welfare*, 368 F.Supp. 454, 462-65 (E.D.Pa. 1973)(if pled with required specificity, Thirteenth Amendment damage claims will lie against state mental health officials).-

[20] *See Will v. Michigan Department of State Police*, 491 U.S. at 71 (a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself"). *Cf. Hafer v. Melo*, No. 90-681 (Nov. 5, 1991)(state officers may be held liable for damages under § 1983 for official acts if sued in personal capacity).

handicapped children. The church filed suit in state court under the Takings Clause of the Fifth Amendment, seeking "'damages for the uncompensated taking of all use of [the camp].'" 482 U.S. at 309. The state courts denied monetary relief for the temporary regulatory "taking" of the camp property. *Id.* at 308-09. This Court reversed, invoking the long-established principle that damage suits seeking just compensation for takings of property are premised directly on the Takings Clause itself:

> "Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States."

Id. at 315 (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)(emphasis omitted).

Petitioners here have been victimized by a far more egregious regulatory taking. No state agency formally declared them to be indentured servants of the state, but their labor was nevertheless expropriated by the exercise of state power. Although the Due Process Clause of the Fourteenth Amendment has been held inapplicable to the "taking" of "a man's labor," *see Butler v. Perry*, 240 U.S. 328, 333 (1916), the Thirteenth Amendment is the relevant constitutional provision where the issue is the forced "taking" of labor. And the Thirteenth Amendment, like the Fifth, "is 'self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.'" *United States v. Kozminski*, 487 U.S. 931, 942 (1988). *See also Bailey v. Alabama*, 219 U.S. 219, 241 (1911). Just as the plaintiff in *First English* sought damages for the temporary, uncompensated taking of all use of its camp property, the petitioners here seek damages for the temporary, uncompensated taking of all use of their hands -- their labor -- from 1970-1974.

Surely it cannot be the law that a state must pay compensation if it takes a church camp for the handicapped, but that it need pay nothing if, instead, it forces its institutionalized handicapped citizens to build and operate a camp for the state. For the Thirteenth Amendment's "free labor" principle itself embodies a profound rejection of such a distinction between physical labor and physical property. The Framers of that Amendment not only incorporated John Locke's premise that one is the absolute proprietor of one's

own labor but also embraced the corollary that human labor itself is the most inviolable form of property, because labor is the original foundation of -- the central value that creates -- all other property.[21] The Amendment's Framers rejected a distinction between lying in wait to steal a man's sack of flour and forcing that man to grow, harvest and mill wheat into flour for you: both were forms of "robbery."[22]

If anything, petitioners have a clearer constitutional entitlement than landowners (such as the First English Evangelical Lutheran Church) to damages for state expropriation. A victim of a temporary regulatory taking of property has lost, for a time, the use of or income from her property but, even without damages, would still enjoy the value of that property when eventually returned. By contrast, a victim of involuntary servitude is left with nothing to show for her labor; injunctive relief will often be of no value to the victim of such servitude, for in many cases legal action is impractical until escape or release from the forced labor situation. *See, e.g., Arahovitis v. States*, 466 N.Y.S.2d at 929. In that context no alternative form of judicial relief is available; "it is damages or nothing." *Davis v. Passman*, 442 U.S. at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment)). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *Bivens*, 403 U.S. at 395, and damages in the form of restitution are particularly appropriate

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[21] *See* J.Locke, *The Second Treatise of Government* §§ 27, 42-45 (1690); VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U.Penn.L.Rev. 437, 503 (1989); Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 So.Cal.L.Rev. 257, 312-14 (1990); tenBroek, *Thirteenth Amendment: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 Cal.L.Rev. 171, 172-78, 200 (1951); *Bailey v. Alabama*, 219 U.S. at 241 (Amendment was adopted "to make labor free" and to end control of one man's personal service by another); *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896)("involuntary servitude" denies a person the control of his own "labor and services," the right freely to dispose "of his own person, property and services"); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 110 & note (1873)(Field, J., dissenting)(the "right of free labor" is "'[t]he property which every man has in his own labor,' says Adam Smith, 'as it is the original foundation of all other property, so it is the most sacred and inviolable.'")

[22] *See* Cong. Globe, 38th Cong., 1st Sess., app. at 112 (1864)(remarks of Sen. Timothy Howe).

when the constitutional violation involves *uncompensated* involuntary labor.

To be sure, the very words of the Takings Clause of the Fifth Amendment prescribe a compensation remedy, whereas those of the Thirteenth Amendment do not. But this verbal difference reflects only an obvious distinction: the Constitution does not prohibit the taking of private property *per se* but only imposes a condition of just compensation on an otherwise legitimate taking, while involuntary servitude is outlawed unconditionally, whether compensation is provided or not. The Thirteenth Amendment's language does not speak of compensation simply because its authors could imagine no circumstance in which slavery or involuntary servitude should be tolerated "except as a punishment for crime." Thus, while just compensation is the *exclusive* "remedy" for an otherwise valid taking of private property, restitution is the *minimum* remedy for a taking of labor.

In any event, pursuant to long-established principles most recently expressed in *McKesson*, there should be no doubt that a state may be held liable for restitution in a state court suit directly premised on a federal constitutional provision, even if that provision does not expressly refer to compensation. Like the Thirteenth Amendment, neither the Commerce Clause nor the Due Process Clause expressly provides for a compensation remedy, yet this Court unanimously reaffirmed in *McKesson* that "no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress . . . ." *Id.* at 2251.[23]

The same is surely true here: Indiana cannot cure the invalidity of its regime of coerced patient labor except by undoing the unlawful deprivation to the only extent now possible -- by paying those patients restitution for the fair value of the labor extorted from

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[23] In *McKesson*, a corporation claimed in a Florida state court that a state liquor excise tax violated the Commerce Clause, Art. I, § 8. The Florida Supreme Court declared the tax invalid and enjoined it, but refused to direct the state to give the corporation an appropriate refund. This Court unanimously reversed: "'To say that the [state] could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [persons] arbitrarily and without due process of law.'" 110 S.Ct. at 2248 (quoting *Ward v. Love County*, 253 U.S. 17, 24 (1920)).

them. *First English* and *McKesson* teach, at the very least, that if a state expropriates value in violation of the federal Constitution, the state cannot be let off with a judicial admonition not to do it again. Here the state has used its power to take a valuable -- indeed, the *most* valuable -- form of property away from a private party, and the state must now make restitution. The Indiana Supreme Court's holding to the contrary suggests that property and capital are worth more in constitutional terms than human labor and human dignity. The decision below thus inverts the scale of constitutional values embodied in the Thirteenth Amendment itself, which wrought the greatest uncompensated "taking" of "property" in American history -- four million slaves -- precisely to guarantee the primacy of a person's right to the fruits of her own labor. *See also* U.S.Const., Amend. XIV, § 4 (claims "for the loss or emancipation of any slave . . . shall be held illegal and void.").[24]

Victims of involuntary servitude should be able to seek restitution for their labor, rather than simply declaratory and injunctive relief, under the Thirteenth Amendment. Other courts have so held and the logic of this Court's recent decisions supports that judgment. Because the Indiana Supreme Court denied this right of minimal restitution in a sweeping opinion that rules out *any* compensation under the Thirteenth Amendment in *any* circumstances -- no matter how grotesque or outrageous the slavery or involuntary servitude may be, at the hands of either public or private masters -- this Court should grant the writ.

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[24] Nor can fiscal concerns void a Thirteenth Amendment damage remedy. The defendants in this action argued that ordering full compensation for petitioners' labors would impose financial strain on the State of Indiana, and the Indiana Supreme Court showed sympathy for this position. (A12). But in *McKesson*, this Court firmly rejected the notion that a state's financial hardship excused it from providing relief for unconstitutional expropriations. 110 S.Ct. at 2257. Petitioners here seek no windfall. Indeed, they do not even seek, and were not awarded by the trial court, *any* compensation for the pain, suffering and subjugation caused by involuntary servitude. They seek only the basic minimum wage that the trial court awarded, the minimum restitution owed for services rendered to the state.

III. THE DECISION BELOW DISTORTS AND CONFOUNDS RETROACTIVITY DOCTRINE BY ALLOWING A CASE TO BE DECIDED ON THE BASIS OF AN OVERRULED DECISION THAT WAS NOT THE GOVERNING LAW EITHER WHEN THE EVENTS AT ISSUE TRANSPIRED OR WHEN THE CASE WAS ULTIMATELY DECIDED ON APPEAL.

Finally, this Court should grant the writ in order to correct fundamental misreadings of both (1) this Court's constitutional retroactivity doctrine, and (2) this Court's decision in *National League of Cities*. These two errors have thwarted the application of an otherwise controlling federal statute and may, unless corrected, cause great mischief in future litigation.

The Indiana Supreme Court rejected petitioners' claim under the FLSA by surprisingly invoking *National League of Cities*, concluding that state sovereignty principles forbade Congress from extending minimum wage protection to mental patients forced to work in state hospitals.

The most glaring objection to this result is that *National League of Cities*, decided in 1976, is not the law. It was explicitly overruled by this Court in 1985 in *Garcia*. Indeed, *National League of Cities* was not the law when the Indiana Supreme Court decided this case (1991), when petitioners' claims arose (1970-74), when petitioners filed suit (1974), or when the case was tried and appealed (1987-91). Because *National League of Cities* was *not the law* at any relevant time in the history of this case, the court below had no proper occasion even to determine *whether* to apply that decision retroactively.

The strangeness and unfairness of selecting *National League of Cities* to govern this case is underscored by considering the Indiana Supreme Court's refusal to apply the *Garcia* decision. *Garcia* is a wildly inappropriate case for a court to refuse to apply retroactively in these circumstances, because *that case did not really establish a new judicial rule of constitutional law at all*; rather, it removed a prior court-made impediment to an otherwise controlling Act of

Congress.[25] In essence, petitioners did not ask the Indiana Supreme Court "to apply" *Garcia*; they simply asked that court *to apply the FLSA* to events that occurred in a period when that congressional enactment was held to be constitutional. *See Maryland v. Wirtz*, 392 U.S. 183 (1968).[26]

The utter confusion of the court below will not, sadly, prevent its approach from cutting a wide swath through the legal landscape. This Court, of course, will continue to confront circumstances in which it feels it must overrule one of its own precedents -- circumstances some believe may occur with greater frequency in the next few years. *See, e.g., Payne v. Tennessee*, 111 S.Ct. 2597, 2623 &

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[25] To be sure, several courts have declined to apply *Garcia* retroactively, including the Fifth Circuit in the *Garcia* case itself on remand. *Garcia v. San Antonio Metro. Transit Authority*, 838 F.2d 1411 (5th Cir.), *cert. denied*, 488 U.S. 889 (1988). But those cases involved FLSA claims for periods that fell within the *National League of Cities* era, when states and municipalities could be said to have "acted in good faith . . . believing for substantial precedential reasons that they were exempt from the FLSA . . . ." *Id.* at 1420. *See also Austin v. City of Bisbee*, 855 F.2d 1429 (9th Cir. 1988); *Ackinclose v. Palm Beach County, Fla.*, 845 F.2d 931 (11th Cir. 1988); *Mineo v. Port Authority*, 779 F.2d 939 (3rd Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986). Indiana can make no such claim here.

[26] The determination of whether a constitutional decision of this Court should be applied retroactively by a state court is, of course, a matter of federal law. *American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2330-31 (1990) (plurality opinion). As the Indiana Supreme Court acknowledged, controlling principles of federal law generally require retroactivity; that is, a court must apply the federal constitutional law in effect at the time it decides a case. (A11)(citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987)).

The recent decisions of this Court in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991), and *American Trucking* indicate that nonretroactivity (also called prospectivity) may be inappropriate in many circumstances, and where it *is* invoked, must meet the three-factor test summarized by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Whatever else may be said of this Court's nonretroactivity doctrine, it should at least be clear that the doctrine is properly invoked only when a party claims that a *present* constitutional rule -- a rule that limits government power pursuant to a court's reading of the Constitution -- should not be applied to a controversy that occurred prior to the rule's adoption. *See James B. Beam*; *American Trucking*; *Chevron Oil*. There is no precedent or reason for using nonretroactivity doctrine to *resurrect* and apply an *overruled* decision that was not in effect when the events giving rise to the suit occurred -- especially where doing so would evade an otherwise applicable Act of Congress. The Indiana Supreme Court nevertheless did just that, citing as authority only the irrelevant fact that this Court retroactively applied *National League of Cities* in *Indiana v. Usery*, 427 U.S. 909 (1976). But the Court took that step only when *National League of Cities* was the law of the land, *not* after it had been overruled.

n. 2 (1991) (Marshall, J., dissenting). Thus, the issue that confounded the court below -- the import of an overruled precedent that was in force for a period during a lawsuit's pendency -- may well be a recurring one, especially because lawsuits raising constitutional issues can last for many years. Resourceful attorneys may be expected to unearth intervening but overruled precedents which various litigation decisions purportedly relied upon -- just as the State of Indiana says it did here. Clarity in this area of the law could prevent many a lawsuit from becoming needlessly mired in illusory choice-of-law questions.

The Indiana Supreme Court called *National League of Cities*, which *Garcia* overruled, a decision "on which the State of Indiana had relied." (A12). But Indiana could not have relied on the 1976 decision in *National League of Cities* in undertaking the conduct that gave rise to this litigation -- its failure *between 1970 and 1974* to pay federal minimum wages, or indeed any wages at all, to its patient laborers. The court below found "reliance" in the State's omission, during the nine years that *National League of Cities* was the law, to seek a declaratory judgment with respect to petitioners' FLSA claim. (A12). But even if *National League of Cities ever* immunized the kind of involuntary servitude that was at issue in this case from the reach of congressional legislation -- which it did not, *see* Part IV, *infra* -- this alleged "reliance" is surely not the sort that this Court's retroactivity/non-retroactivity doctrines were designed to protect. Reliance analysis compares a party's fate under the new or current law with expectations at the time of the "*operative conduct or events* that would be affected by the new decision." *American Trucking*, 110 S.Ct. at 2338 (O'Connor, J., for the plurality)(emphasis added); *see also id.* at 2339 (proper "focus[]" is "on the operative conduct or events"); *id.* at 2336 ("the critical event for prospectivity is 'the occurrence of the underlying transaction'"); *Chevron Oil v. Huson*, 404 U.S. 97, 107 (1971); *James B. Beam*, 111 S.Ct. at 2443 (opinion of Souter, J.).

Apart from any "reliance," the Indiana Supreme Court reasoned that, although FLSA was aimed at helping employees, applying the FLSA to this case would "place fiscal pressures on the State that could lead to deleterious changes for those very employees." (A12). That court thus substituted its own judgment for that of Congress, which clearly reached a different conclusion when it legislated the

application of minimum wages to state employees.[27]

The Indiana Supreme Court also said it was avoiding unfairness, noting that a comparable FLSA lawsuit brought by Indiana mental hospital non-patient employees had been dismissed in light of *National League of Cities*. *See Indiana v. Usery*, *supra*. But the fact that non-patient workers were unlucky enough to have their claims resolved to conclusion during the *National League of Cities* era, while petitioners here had the supposed "good luck" to have their case delayed for years in the Indiana courts, surely does not justify a refusal to apply current law. As dissenting Indiana Supreme Court Justice Dickson observed, "Two inequities are more substantial than one." (A40).[28] Thus, retroactive application of *National League of Cities* was not only technically improper but also cut against the very goal of nonretroactivity law, for it "deprive[d]

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[27] The Indiana Supreme Court (A13) relied on a congressional amendment precluding retroactive application of *Garcia* with respect to the FLSA *overtime* provision -- but *not* the minimum wage provision -- as it applied to, *inter alia*, state "public health" workers. The same amendment also immunized United States *territories* from certain FLSA minimum wage obligations. Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, § 2(c)(1), 99 Stat. 787, 788-89 (1985). By its very terms, this amendment did nothing to immunize *states* from pre-*Garcia* *minimum wage* obligations. *See* S.Rep. No. 99-150 at 8-9, reprinted in U.S. Code Cong. & Ad. News 656 ("The Committee recognizes that the financial costs of coming into compliance with the FLSA -- *particularly the overtime provisions* of [29 U.S.C. § 207] -- are a matter of grave concern to many states and localities.")(emphasis added). Thus, Congress expressly addressed the issue of retrospective state liability in the wake of *Garcia*, and it deliberately chose to protect the minimum wage rights of state workers over the financial interests of the states.

[28] Moreover, "the level of harm suffered by the plaintiffs in the present case differs dramatically from that suffered by the plaintiffs in [*Indiana v. Usery*]. In the latter instance, the employees were at least paid basic wages, and were deprived only of their claim for overtime compensation. The present plaintiffs received no wages whatsoever for their labors . . . ." (A40-41).

Justice Dickson also noted (A42) that one rationale offered by the Fifth Circuit in declining to apply this Court's *Garcia* decision retroactively to the *Garcia* case itself was that the transit authority workers at issue there may have received the equivalent of overtime compensation in the form of higher regular hourly wages, because the transit authority had to compete in the labor market with employers required by FLSA to pay overtime. *See Garcia*, 838 F.2d at 1420. By contrast, petitioners here were not protected by market forces; they "literally constituted a captive labor force" (A42) and the State paid them nothing at all. The equities favor minimum wage protections for these wholly uncompensated patient workers.

[petitioners] of any [FLSA] remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." *Chevron Oil*, 404 U.S. at 108.

The court below finally suggested that its interposition of *National League of Cities* was of no great consequence because the State potentially had a good faith immunity defense: in the years 1970-74, the State might have believed that patient/workers were in any case not covered by FLSA. (A15). *See* 29 U.S.C. § 259 (providing immunity from FLSA claims for employers who prove good faith conformity with any written Labor Department enforcement policy). The facts indicate the contrary,[29] but in any event petitioners should be permitted to litigate fully their claim of entitlement to FLSA coverage, rather than have the merits of that claim rejected as an afterthought in a dictum appended to an erroneous constitutional decision.[30]

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[29] In the period for which petitioners seek minimum wages, the Department of Labor had in place a policy statement interpreting the 1966 FLSA amendments to cover work by a hospital patient unless the patient was working as part of a program of therapy *and* did not "displace a regular employee or impair the employment opportunities of others . . . ." *See Souder v. Brennan*, 367 F.Supp. 808, 815, Appendix A (D.D.C. 1973). The Department initially declined to enforce this policy but was ordered to do so in 1973. *Id.* at 809-10. Relying on the plain language of the Act, its broad remedial purpose, its express exemptions for certain categories of workers but not for patient/workers, and the deference owed to the Department's own policy statement, the court concluded that patient laborers were employees within the meaning of FLSA and thus covered by the minimum wage and overtime provisions of the Act. *Id.* at 812-14. At least two other district courts concluded in this period that patient/workers could invoke the FLSA's minimum wage requirements. *See Weidenfeller v. Kidulis*, 380 F.Supp. 445, 448-50 (E.D.Wis. 1974); *Wyatt v. Stickney*, 344 F.Supp. 387, 402 (M.D.Ala. 1972), *aff'd in part and remanded in part on other grounds sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

[30] Further brief dicta in the Indiana Supreme Court's opinion suggest that petitioners failed to meet relevant class action procedural requirements. (A15). This matter, which petitioners briefed before the Indiana Supreme Court, should also be fully addressed on remand, rather than relegated to dicta. In any case, even an unfavorable result on this issue would not eliminate the claims of the class representatives.

IV. THE DECISION BELOW PERVERTS PRINCIPLES OF STATE SOVEREIGNTY BY HOLDING THAT THE POWER TO COERCE INSTITUTIONALIZED MENTAL PATIENTS INTO PROVIDING FREE LABOR FOR THE STATE IS AN INTEGRAL, CORE GOVERNMENTAL FUNCTION THAT CONGRESS IS POWERLESS TO REGULATE.

A subsidiary but nonetheless significant constitutional error made by the Indiana Supreme Court with respect to the FLSA claim was its *interpretation* of *National League of Cities* -- a decision that, although not law today, might one day be resurrected by this Court. *See, e.g., Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting). Even if it *had* been appropriate to apply *National League of Cities* as governing law in this case, the FLSA claim should *still* have been decided in petitioners' favor, and petitioners wish to preserve this argument in the event that the Court grants the writ on the third question presented.

The Indiana Supreme Court simply assumed, without explanation, that under the state sovereignty principles of *National League of Cities* Congress could not constitutionally extend minimum wage protections to private individuals forced to work in state mental hospitals.[31] But a system of mental patient peonage is anything but the sort of sovereign "structur[ing of] integral operations in areas of traditional government functions" that *National League of Cities* sought to protect from federal regulation. *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 684 (1982); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981). Although *National League of Cities* granted the states freedom to pursue essential aspects of their traditional

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[31] Petitioners did not raise the question of interpretation of *National League of Cities* in the Indiana courts because there was no genuine occasion to do so. The trial court did not identify which of petitioners' six theories of recovery it accepted. The intermediate appellate court affirmed on an unrelated theory and never addressed the FLSA claim. Therefore, prior to the Indiana Supreme Court's ruling there was no judicial decision even remotely suggesting that the overruled *National League of Cities* decision should govern petitioners' FLSA claims. In light of the Indiana Supreme Court's surprising decision to apply *National League of Cities*, and its failure to offer any reasons for its assumption that *National League of Cities* foreclosed relief, petitioners should be heard on this subsidiary question.

governmental roles without excessive federal controls, it most assuredly did *not* grant states authority to do whatever they wanted within these spheres. They could not, for example, abduct people and force them to serve as sanitation workers or park rangers without pay, simply because "sanitation" and "parks and recreation" had been identified as "traditional" functions in *National League of Cities*. 426 U.S. at 851 & n. 16. Similarly, forcing mental patients to perform necessary government work without pay is not *and never was* a legitimate and essential aspect of state sovereignty, nor will it be if judicially enforceable principles of state sovereignty again limit Congress. Petitioners were not even recruited as workers; they were committed to state mental hospitals as people in need of treatment. They were nevertheless coerced into working full-time jobs without pay. No one could seriously believe that forcing patients to perform unpaid labor needed by the state is an "integral" or "traditional" state function, so vital to state sovereignty that requiring the state to pay its patient laborers the minimum wage would impinge on principles of federalism.

Petitioners accordingly urge this Court to grant the writ to correct the strange "resurrection" principle that the decision below has introduced into federal retroactivity doctrine and, if necessary, to review and reverse the Indiana Supreme Court's facile assumption that a principled commitment to states' rights would somehow bar petitioners' FLSA minimum wage claim.

CONCLUSION

For the reasons set forth above, petitioners urge that this Court grant the writ.

Respectfully submitted,

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APPENDIX A

EVAN BAYH, as Governor of the State of Indiana, JERRY THADEN, as Commissioner of the Indiana Department of Mental Health, and THE INDIANA PATIENT REMUNERATION BOARD, Appellants (Defendants Below),

v.

LEO SONNENBURG, GERALD HARTNETT, and DENNIS SHEFFIELD, on behalf of themselves and all other similarly situated persons, Appellees (Plaintiffs Below)

No. 37S03-9106-CV-437

Supreme Court of Indiana

573 N.E.2d 398

June 12, 1991, Filed

Rehearing Denied September 17, 1991.

Appeal from the Jasper Circuit Court

Before: SHEPARD, C.J., DEBRULER, GIVAN, and KRAHULIK, JJ., concur. DICKSON, J., dissents with separate opinion.

The Jasper Circuit Court entered a judgment for nearly $28 million against the State of Indiana in this class action brought on behalf of 7400 patients of Indiana's mental hospitals for work they performed while confined in those hospitals in the early 1970's. We hold that the patients are not entitled to compensation and reverse the judgment of the trial court.

I. Background and Procedural History

On May 23, 1974, Leo Sonnenburg and Gerald Hartnett filed this class action in the LaPorte Circuit Court against then-Governor Otis Bowen and then-Commissioner of the Department of Mental Health William Murray. Plaintiffs sought compensation for labor performed while they were patients in state mental hospitals. The original complaint contended the plaintiffs were entitled to payment under the minimum wage and overtime provisions of the Fair Labor

Standards Act, 29 U.S.C. §§ 206, 207 (1988) [hereinafter FLSA],[1] and the involuntary servitude clause of the thirteenth amendment to the United States Constitution.

In March 1976, plaintiffs amended their complaint to add a count based on Indiana's patient remuneration law, Ind. Code §§ 16-13 -12.8-1 to -10 (Burns 1973). Indiana's patient remuneration board, which had been created by that law, was added as a defendant. After the United States Supreme Court ruled in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the Constitution prohibited application of FLSA to many state employees, plaintiffs again amended their complaint to drop the FLSA count and add a count based on quasi-contract.

In 1978, the trial court entered an order delineating the plaintiff class and granting partial summary judgment for the class based on the patient remuneration law. Defendants perfected an interlocutory appeal from this order. The Court of Appeals reversed both the class determination and the partial summary judgment, and remanded. *Bowen v. Sonnenburg* (1980), Ind. App., 411 N.E.2d 390. Following remand, the case was venued to the Jasper Circuit Court. Judge Kanne certified Gerald Hartnett and Dennis Sheffield as class representatives; Leo Sonnenburg was not allowed to serve due to mental incapacity. Judge Kanne also certified the class as "[a]ll patient workers who have labored in the State of Indiana Institutions for the Mentally Handicapped or Mentally Retarded from May 23, 1970 to December 31, 1974." So certified, the class totalled 7419. After the U.S. Supreme Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), plaintiffs moved to amend their complaint to resurrect their FLSA claim. Defendants opposed the motion on grounds of prejudice, but the trial court granted leave to amend. It also permitted defendants to file a counterclaim for over $200 million against the plaintiff class seeking payment for the cost of providing hospitalization to class members. The counterclaim was withdrawn by the defendants on October 24, 1986.

A special judge, William Andersen, Jr., was appointed in

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[1] Apparently, this lawsuit sprouted from a seed planted by the decision in *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973), that the FLSA's minimum wage and overtime provisions applied to work performed by mental patients while hospitalized in non-federal institutions.

October 1985, and the case was tried to the bench in 1987. During trial, the plaintiffs introduced a new count based on § 21 of the Indiana Bill of Rights (just compensation for particular services),[2] and raised a claim under 42 U.S.C. § 1983 (1988). The § 1983 claim alleged violations of the thirteenth and fourteenth amendments, the FLSA, and a federal anti-peonage statute, 42 U.S.C. § 1994 (1988).

Judge Andersen rendered a general judgment for plaintiffs without findings of fact and conclusions of law on November 17, 1987. The court awarded nearly $14 million to the plaintiff class, an amount derived by multiplying the number of hours worked by $1.60. On top of this, the court ordered defendants to pay an equal amount in prejudgment interest, bringing the total judgment to nearly $28 million. From this total, the court awarded $5.5 million in attorney fees to plaintiffs' counsel and nearly $84,000 in costs. The court also reserved $2.5 million for potential payments to counsel for post-judgment services. Defendants moved for a stay of judgment pending appeal, pursuant to Indiana Trial Rule 62, which the court granted without a bond.

On appeal, defendants principally contended that the verdict was contrary to law, unsupported by any of the legal theories advanced by the plaintiffs. They also claimed the trial court erred in allowing the total judgment to increase with the discovery of new class members, in awarding prejudgment interest, in awarding costs, and in awarding attorney fees far above the lodestar amount.[3]

The Court of Appeals affirmed in part and reversed in part. It held that plaintiffs were entitled to just compensation for particular services rendered under article I, § 21 of the Indiana Constitution.

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[2] Ind. Const. art. I, § 21. Defendants contend plaintiffs waived this count by failing to amend it to their complaint or include it in their pre-trial brief. Plaintiffs respond that Indiana Trial Rule 15(B) permits a court to decide a case on issues not raised by the pleadings if those issues were tried by the express or implied consent of the parties. During their opening statement at trial, plaintiffs referred to article I, § 21 as one of their several theories of recovery. This placed the defendants on notice, and a four-month break in the trial provided them with ample opportunity to respond. The state constitutional claim was not waived.

[3] The lodestar amount is derived by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 734 (1987) (O'Connor, J., concurring in judgment).

Orr v. Sonnenburg (1989), Ind. App., 542 N.E.2d 201, 205. It refused, however, to allow the judgment to increase as new members of the class were discovered. Over Judge Staton's dissent, the Court of Appeals also reversed the award of prejudgment interest. Having thereby reduced the total award by half, the Court of Appeals vacated the award of attorney fees and remanded to the trial court with instructions to recalculate it. The Court of Appeals did not, however, disagree with the trial court's method for calculating attorney fees. On the contrary, it held that a trial court need not limit a fee award to the lodestar amount and that a trial court may exercise discretion in setting the fee. *Id.* at 207.

Both sides have petitioned this Court for transfer. Plaintiffs claim the Court of Appeals erred in refusing to allow prejudgment interest and in refusing to allow the judgment to increase with the discovery of new class members. Defendants claim the Court of Appeals erred: in interpreting article I, § 21; in deciding that attorney fees need not be based on the lodestar amount; and in failing to specify whether the award constituted damages (presumably untaxed) or wages (presumably taxed). Because the Court of Appeals failed to give a statement in writing on plaintiffs' non-constitutional claims, Ind. Appellate Rule 11(B)(2)(e), and because the constitutional issue is one of first impression, App. R. 11(B)(2)(b), we grant transfer and vacate the opinion of the Court of Appeals.

II. Nonconstitutional Issues Come First

The Court of Appeals recognized that there were six theories on which the trial court could have based its verdict, four of which were nonconstitutional theories.[4] *Orr v. Sonnenburg*, 542 N.E.2d at 203-04. The court also correctly noted that the trial court's general judgment must be affirmed if it is sustainable on any theory

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[4] Those six theories are:
(1) the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206, 207 (1988);
(2) the Civil Rights Act, 42 U.S.C. § 1983 (1988);
(3) Indiana's patient remuneration law, Ind. Code §§ 16-13-12.8-1 to -10 (repealed in 1985 and replaced by Ind. Code §§ 16-13-23-1 to -9 (West Supp. 1990));
(4) unjust enrichment;
(5) the thirteenth amendment to the United States Constitution; and,
(6) article I, § 21 of the Indiana Constitution.

supported by the record.[5] *Id.* at 204. Without first addressing the viability of the four nonconstitutional claims, the Court of Appeals embraced article I, § 21 of the Indiana Constitution as being "[o]ne of the theories . . . upon which the trial court's judgment may be sustained." *Id.* at 204. While a reviewing court can freely choose any apparent statutory or common law basis upon which a judgment can be sustained, constitutional issues are to be avoided as long as there are potentially dispositive statutory or common law issues still alive. It is "the duty of the court not to enter upon the consideration of a constitutional question where the court can perceive another ground on which it may properly rest its decision." *Bureau of Motor Vehicles v. Scott* (1986), Ind., 497 N.E.2d 557, 559 (quoting *Applegate v. State ex rel. Bowling* (1901), 158 Ind. 119, 124, 63 N.E. 16, 18).

Therefore, before we reach the constitutional questions raised by the parties, we first explore whether the trial court's judgment can be affirmed on one of the four nonconstitutional theories. If it can be, then this Court will not reach the constitutional claims. If it cannot, then plaintiffs' constitutional claims must stand on their own merits.

A. Section 1983

Section 1983 of Title 42 provides a civil remedy against any "person" who, under color of state law, subjects a "citizen of the United States" to the "deprivation of any rights, privileges, or immunities" secured by the federal Constitution or federal laws.[6] Plaintiffs have sued the Governor and the Commissioner of the Department of Mental Health in their official capacities, and the Indiana Patient Remuneration Board. To maintain this § 1983 action, plaintiffs must show that the named defendants are "persons"

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[5] The same standard governs this Court. When reviewing general judgments issued in a civil case tried to the bench, this Court asks only whether there is substantial evidence of probative value supporting the verdict on any legal theory. We do not reweigh evidence or judge the credibility of witnesses. In examining the record, we consider only the evidence most favorable to the prevailing party along with all reasonable inferences to be drawn from it. *Martin v. Roberts* (1984), Ind., 464 N.E.2d 896, 904; *see also* 4A K. Stroud, Indiana Practice § 12.6, at 140 (1990).

[6] 42 U.S.C. § 1983 (1988).

as that word is used in § 1983. Plaintiffs cite *Stanton v. Godfrey* (1981), Ind. App., 415 N.E.2d 103, for the proposition that state agencies and state government officials, when sued in their official capacities, are "persons" under § 1983. In *Stanton*, the Court of Appeals held that the Indiana Department of Public Welfare and its administrator, when sued in his official capacity, were "persons" under § 1983. *Id.* at 107. That holding, however, was implicitly overruled by *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), in which the U.S. Supreme Court held the contrary. The *Will* Court stated:

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself. . . .
>
> We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983.

Id. at 71 (citations omitted).

The plaintiffs' § 1983 action therefore fails because the named defendants are not "persons" under § 1983.

B. Indiana's Patient Remuneration Law

The General Assembly first passed a patient remuneration act in 1969 as House Enrolled Act No. 1234, but that act was vetoed by Governor Edgar Whitcomb in March 1969 because "the Legislature did not appropriate sufficient funds to finance this program." 1971 Ind. House Journal 114 (veto message delivered to the House of Representatives on January 14, 1971). On January 22, 1971, the General Assembly passed the bill over the Governor's veto. 1971 Ind. Acts 20.

Although the legislature subsequently amended the law several times,[7] the versions of the law relevant to this dispute (the 1971 and

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[7] After overriding the Governor's veto in January 1971, the same session of the legislature amended the law in April. 1971 Ind. Acts 2124 (Pub. L. No. 474). The legislature amended the law again in 1972, 1975 and 1978. 1972 Ind. Acts 10 (Pub. L. No. 3); 1975 Ind. Acts 878 (Pub. L. No. 151); 1978 Ind. Acts 726 (Pub. L. No. 21). In 1985, it repealed the act altogether and adopted a drastically different law that prohibited the State from working mental patients without their

1972 versions) contained the following material provisions. The law established a multi-member patient remuneration board which was responsible for drafting a mental patient pay schedule. This schedule was to classify all work activities performed by mental patients and attach a pay rate to each job. The board was given six months from the effective date of the act to prepare the schedule and present it to the Department of Mental Health's personnel director. The schedule was then to "become effective within thirty (30) days after having been reviewed and approved by the State Budget Agency as to the availability of funds to implement its provisions." 1971 Ind. Acts 2124, 2126 (Pub. L. No. 474, § 3(d)); *accord* 1972 Ind. Acts 10, 12 (Pub. L. No. 3, § 3(d)). Any patient performing work was entitled to remuneration "[o]n and after the date the . . . schedule . . . shall first become effective . . . if funds are available at the rate set forth in the remuneration schedule." 1971 Ind. Acts at 2126 (Pub. L. No. 474, § 3(f)); *accord* 1972 Ind. Acts at 12-13 (Pub. L. No. 3, § 3(f)). Although patients were to be paid for work activities, the law also authorized the state to apply any patient's income exceeding $60 per month to the "charges of the hospital for maintenance, care, and treatment of the patient, to the extent of the charge." 1971 Ind. Acts at 2127 (Pub. L. No. 474, § 4(b)); *accord* 1972 Ind. Acts at 13 (Pub. L. No. 3, § 4(b)). Moreover, the law did not require payment for patient work that was therapeutic. 1971 Ind. Acts at 2128 (Pub. L. No. 474, § 6(c)); *accord* 1972 Ind. Acts at 15 (Pub. L. No. 3, § 7(c)). The legislature appropriated $50,000 per year from the state general fund "to accomplish all of the purposes of this act." 1971 Ind. Acts at 2129 (Pub. L. No. 474, § 9); *accord* 1972 Ind. Acts at 16 (Pub. L. No. 3, § 10).

Plaintiffs contend that the patient remuneration law entitled them to be paid for the work they performed in the mental hospitals. We disagree. The law required that patients be paid *after* the remuneration schedule became "effective." 1971 Ind. Acts at 2126 (Pub. L. No. 474, § 3(f)); 1972 Ind. Acts at 12 (Pub. L. No. 3, § 3(f)). The schedule could not become legally "effective," however, until it was drafted by the board, and reviewed and approved by the State Budget Agency. 1971 Ind. Acts 2126 (Pub. L. No. 474, § 3(d));

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consent and without pay. 1985 Ind. Acts 227, 260-61, 286 (Pub. L. No. 28-1965, §§ 32, 64) (now codified at Ind. Code §§ 16-13-23-1 to -9 (West Supp. 1990)).

1972 Ind. Acts 12 (Pub. L. No. 3, § 3(d)). The board was not appointed until January 9, 1973, and did not adopt a schedule until May 11, 1973. Record at 1543. On August 17, 1973, the board asked the State Budget Agency to review and approve the schedule but the Budget Agency never responded. Because the pay schedule never became "effective," plaintiffs have no right under the act to payment for work performed from 1970 to 1974.

Plaintiffs argue that their right to recover under the act cannot be stripped away by the failure of the patient remuneration board and the State Budget Agency to perform duties mandated by statute. Such a result, argue the plaintiffs, constitutes a "bureaucratic veto" of the law. They point out that in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the U.S. Supreme Court rejected the notion that an executive officer could effectively veto a law by refusing to enforce it. In *Kendall*, that Court held that mandamus would lie against the postmaster general, who had refused to credit Stokes' account as directed by statute.

Federal separation of powers decisions like *Kendall*, of course, do not determine the distribution of powers under article III of the Indiana Constitution.[8] Assuming for sake of argument that mandamus might lie against an Indiana executive officer who fails to perform a duty, such cannot be said to support an award of damages in an action at law. After all, plaintiffs are not here seeking mandamus. They are seeking back wages on the assumption that the patient remuneration board and the State Budget Agency would have made a series of complicated discretionary decisions in their favor.[9] Even if a mandate had been issued, payments under it would have been severely limited by the legislature's strict appropriation: "There is hereby appropriated annually from the state general fund the sum of fifty thousand dollars [$50,000] to accomplish all of the purposes of this act. The maximum annual expenditure may

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[8] *See Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991) (U.S. Constitution does not require a state to imitate separation of powers prescribed for the federal government).

[9] Even the *Kendall* Court recognized that relief under mandamus would be limited by legislative authority over appropriations: "No money was required to be paid, and none could have been drawn out of the treasury without further legislative provision, if this credit should overbalance the debit standing against the relators." *Kendall*, 37 U.S. (12 Pet.) at 614.

not exceed this specific appropriation." 1971 Ind. Acts at 2129 (Pub. L. No. 474, § 9); 1972 Ind. Acts at 16 (Pub. L. No. 3, § 10).

Because the patient remuneration schedule never went into effect, plaintiffs have no claim under that law. The judgment of the trial court cannot be affirmed on this theory of recovery.

C. Fair Labor Standards Act

Plaintiffs contend that they are entitled to compensation under the minimum wage and maximum hour provisions of the Fair Labor Standards Act. FLSA mandates that certain employers pay their employees a federally-established minimum wage and that they not work their employees more than a maximum number of hours each week without premium pay. 29 U.S.C. §§ 206, 207 (1988). Employers who violate these provisions can be sued by their employees for back wages and an equal amount in liquidated damages. 29 U.S.C. § 216(b) (1988).

The history of this act and the Supreme Court's decisions concerning it are central to the resolution of this claim. When FLSA was first enacted in 1938, Congress specifically excluded state government employees from these minimum wage and maximum hour provisions. Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060, 1060 (1938). In 1966, FLSA was amended to remove employees of state mental hospitals from this governmental exclusion. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831 (1966). The Supreme Court upheld the constitutionality of this amendment in *Maryland v. Wirtz*, 392 U.S. 183 (1968). In 1974, Congress further amended the act so that it applied to almost all state government employees. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(2), 88 Stat. 55, 58-59 (1974). In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court overruled *Wirtz*, and declared unconstitutional the 1966 and 1974 extensions of FLSA coverage to state employees working in "integral operations in areas of traditional governmental functions" on grounds that such an extension unconstitutionally infringed on the states' sovereign powers. *Id.* at 852. The Court specifically noted that state hospital employees were included under this umbrella of protected state sovereignty. *Id.* at 855.

The Court reversed itself nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985), declaring that the "traditional governmental function" test it had erected in *National League of Cities* was both "unworkable" and "inconsistent" with the very principles of federalism the test was intended to foster. Under *Garcia*, the 1966 and 1974 extensions of the FLSA are constitutional.

Despite these shifting legal sands, plaintiffs today claim they stand on solid ground in arguing that the FLSA's minimum wage and maximum hour provisions apply to the work they performed for the State between May 30, 1970, and December 31, 1974. We disagree, and hold that plaintiffs are not entitled to recover under FLSA for this time period.

With respect to the maximum hours provision, 29 U.S.C. § 207 (1988), the State is clearly not liable to the plaintiff class. Shortly after the *Garcia* decision, Congress amended FLSA to immunize certain pre-1986 violations. That amendment reads:

> (c) *Liability and deferred payment.* --
> (1) *No State*, political subdivision of a State, or interstate governmental agency *shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section* 6 [29 U.S.C. § 206] (in the case of a territory or possession of the United States), *7 [29 U.S.C. § 207]*, or 11(c) (as it relates to section 7) *of such Act occurring before April 15, 1986, with respect to any employee of* the State, political subdivision, or agency *who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985*, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c)(1) 99 Stat. 787, 788-89 (1985) (emphasis added).

The Department of Labor's special enforcement policy referred to by Congress recognized that state hospitals were within the scope of "traditional governmental functions" and that employees working in such hospitals were thus not protected by the FLSA prior to the Garcia decision. 29 C.F.R. §§ 775.2, 775.4 (1985).

The analysis is more complicated with respect to the State's liability under the minimum wage provision, 29 U.S.C. § 206 (1988), because the 1985 Congressional amendment immunized

pre-1986 violations only if they were committed by "a territory or possession of the United States." The resolution of the minimum wage issue thus depends on whether *Garcia* or *National League of Cities* controls. This, in turn, depends on the rule about retroactivity.

Courts applying federal law must apply the law in effect at the time they decide a case. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987). Under this general rule, plaintiffs' FLSA claim must be decided based on the *Garcia* decision, even though that case was decided eleven years after the plaintiffs last worked without pay for the State. There are circumstances, however, in which the retroactive application of a judicial decision is not warranted. The defendants argue, and have argued since plaintiffs first moved to amend their complaint after *Garcia*, that this case presents such circumstances.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), the Supreme Court adopted a three-prong test for deciding when not to apply a case retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." (citations omitted).

Under the *Chevron* test, the party seeking to avoid the retroactive application of a decision bears the burden of persuasion. *Ackinclose v. Palm Beach County*, 845 F.2d 931, 933 (11th Cir. 1988). Examination of the three prongs of the Chevron test in light of the facts and history of this case leads us to conclude that *Garcia* should not be applied retroactively to hold the State liable for its failure to pay the plaintiffs the minimum wage.

First, *Garcia* overruled a clear past precedent, *National League of Cities*, on which the State of Indiana had relied. Plaintiffs argue that the State could not have relied on the National League of Cities case when it decided to refuse to pay them for their work because that case was not decided until 1976, two years after the plaintiffs last worked without pay. This argument ignores the fact that *National League of Cities* was the law of the land for nine years. Between the *National League of Cities* decision and the *Garcia* decision, the State could have obtained a declaratory judgment establishing that it had no obligation to the plaintiffs under FLSA for the years 1970 through 1974.[10] It did not, in reliance on the continued validity of the holding in *National League of Cities*. Though Justice Dickson, dissenting, calls this reliance a matter of conjecture, the record shows that plaintiffs actually withdrew their FLSA claim altogether just three years after this litigation commenced. The State objected to the resurrection of the claim eight years later, providing the trial court with a direct explanation of the prejudice which such resuscitation represented. It seems fair to suggest that when someone withdraws a claim against you, you naturally act in ways that rely on the withdrawal.

As for the second prong of the *Chevron* test, we think the merits of a retroactive application of the *Garcia* decision are outweighed by the demerits. Although the FLSA was intended to help employees, applying *Garcia* retroactively would place fiscal pressures on the State that could lead to deleterious changes for those very employees. Moreover, retroactive application of the decision is unlikely to encourage greater compliance by the State. We are not alone in concluding the merits are outweighed by the demerits. Other courts and the Congress have taken this view as well. Most compelling is the outcome of the plaintiff in *Garcia*. Although Joe Garcia won his case in the Supreme Court, on remand the Fifth Circuit refused to apply the decision retroactively to allow *Garcia* to recover, in part because of the burdens that would be imposed on the government employer by retroactive application, and also because of a perception that the rate of compliance would not be

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[10] Had the State filed such a declaratory judgment action, there is little doubt that it would have prevailed. Although the *National League of Cities* decision was not handed down until 1976, we are convinced that any court interpreting it before the *Garcia* decision would have applied it retroactively. *See infra*.

enhanced. *Garcia v. San Antonio Metropolitan Transit Authority*, 838 F.2d 1411, 1418-20 (5th Cir. 1988), *cert. denied* 488 U.S. 889 (1988). Congress' 1985 amendments precluding retroactive application of the Garcia decision with respect to the overtime provisions of the FLSA were driven by a belief that local governments needed lead time to make necessary adjustments in work practices and fiscal priorities. S. Rep. No. 159, 99th Cong., 1st Sess. 15, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 663. Other courts have also concluded the financial havoc that would result from *Garcia*'s retroactive application outweighs whatever benefit there is. *Cf. Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1433 (9th Cir. 1988); and *Brooks v. Village of Lincolnwood*, 620 F. Supp. 24, 26 (N.D. Ill. 1985) (refusing to apply *Garcia* retroactively to cover claims against municipalities).

As for the third prong of the *Chevron* test, applying *Garcia* retroactively in this case would produce substantial inequitable results between the patients and the staff of the hospitals. Employees of Indiana's state-run mental hospitals sought compensation under FLSA for work performed prior to May 1, 1974. Although their suit met with success at trial and on appeal to the Seventh Circuit, *Brennan v. Indiana*, 517 F.2d 1179 (7th Cir. 1975), it was ultimately dismissed on remand following the Supreme Court's decision in *National League of Cities*. *See Indiana v. Usery*, 427 U.S. 909 (1976) (vacating the Court of Appeals' affirmance of judgment for the employees, and remanding for reconsideration in light of *National League of Cities*). It would hardly be equitable to allow a claim by patients when the employees who cared for the same patients and supervised the patients' work were held not covered by FLSA.

If *Garcia* is not entitled to retroactive application, does *National League of Cities* control this case? Plaintiffs point out that *National League of Cities* was not decided until two years after the patients stopped working without pay. They contend that if the *Garcia* decision is not entitled to retroactive application, then neither is the *National League of Cities* decision, leaving *Maryland v. Wirtz*to control. We disagree.

Unlike the *Garcia* decision, the *National League of Cities* decision does not meet all three prongs of the *Chevron* test, and thus, must be applied retroactively. Although *National League of Cities* overruled a clear past precedent, *Maryland v. Wirtz*, plaintiffs

have not satisfied either of the other two prongs of the *Chevron* test. We see no inequity in applying the *National League of Cities* decision retroactively, nor do we believe that a weighing of the merits and demerits requires it to be given only prospective relief. Plaintiffs have not cited any state or federal court that has refused to apply the *National League of Cities* decision retroactively. Indeed, the Supreme Court itself applied it retroactively as to eliminate the FLSA claim of this state's regular hospital employees. *Indiana v. Usery*, 427 U.S. 909 (1976) (vacating *Brennan v. Indiana*, 517 F.2d 1179 (7th Cir. 1975), and remanding for reconsideration in light of *National League of Cities*). With respect to the *National League of Cities* decision, we see no reason to deviate from the general rule on the retroactive application of new court decisions.

Other Problems with the Claim

While the foregoing analysis is fatal to the plaintiffs' claim, even resolving the retroactivity issue favorably to the plaintiffs leaves several other substantial barriers to recovery. We mention these briefly to illustrate the multiple legal issues which reflect adversely on the claim.

First, it is fairly plain that in enacting the 1966 amendments to FLSA, Congress intended to cover approximately half a million regular employees of state hospitals. *See* S. Rep. No. 1487, 89th Cong., 2d Sess., at 3007 n.2 (1966). The record of the hearings indicates Congress was responding to requests from groups that represented traditional hospital employees, such as the American Nurses' Association and the Building Service Employees' International Union. *See, e.g.*, Amendments to the Fair Labor Standards Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st Sess. 1286-93 (1965) (statement of David Sullivan, General President, Building Service Employees' International Union, AFL-CIO, and written statement of the American Nurses' Association). There is nothing to suggest that Congress intended to require states to pay patients in mental hospitals.

Second, FLSA authorizes the prosecution of class actions but only in accordance with a procedure different from the procedures available under F.R.C.P. 23 and Indiana Trial Rule 23. FLSA

authorizes class actions only on behalf of class members who have affirmatively elected to participate in the litigation. 29 U.S.C. § 216(b) (1988) ("No employee shall be a party plaintiff to any [class] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought"). The record plainly reveals that plaintiffs have not complied with this portion of FLSA, except with respect to the named plaintiffs. Any consents to participate given now, of course, would fail under the applicable statute of limitations. 29 U.S.C. §§ 255 & 256 (1988) (both two and three year statute of limitations continue to run against each party plaintiff until that plaintiff's written consent form is filed in court).

Third, the State has raised a substantial defense under 29 U.S.C. § 259, which provides immunity from violations of FLSA for employees who plead and prove good faith conformity with any written enforcement policy of the Administrator of the Wage and Hour Division of the Department of Labor. The written policy implementing the 1966 amendments, DOL Release G-874, exempted work in the nature of therapy. The extent to which the work at issue in this litigation was simple labor as opposed to therapy is a matter of genuine dispute. Even as to non-therapeutic labor, however, the State maintains a respectable claim of immunity based upon the official policy of the Department of Labor, which was to foreswear any attempt to apply FLSA to residents in hospitals. *See Souder v. Brennan*, 367 F. Supp. at 816 (Appendix B, reciting DOL's October 1969 non-enforcement policy).

Principal Conclusion

FLSA's minimum wage provision did not apply to employees on the payrolls of Indiana's mental hospitals from 1970 to 1974. It did not apply to Joe Garcia. It does not apply to this plaintiff class.

D. Unjust Enrichment

Plaintiffs' sole common law claim is unjust enrichment, also referred to as quantum meruit, contract implied-in-law, constructive contract, or quasi-contract. A quasi-contract, of course, is not a

contract at all;[11] it "is a legal fiction invented by the common-law courts in order to permit a recovery . . . where, in fact, there is no contract, but where the circumstances are such that under the law of natural and immutable justice there should be a recovery as though there had been a promise." *Clark v. Peoples Sav. & Loan Ass'n* (1943), 221 Ind. 168, 171, 46 N.E.2d 681, 682. The *Restatement of Restitution* sets out the theory broadly: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Restatement of Restitution* § 1 (1937).

To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. One who labors without an expectation of payment cannot recover in quasi-contract. *Biggerstaff v. Vanderburgh Humane Soc.* (1983), Ind. App., 453 N.E.2d 363, 364.

There is not substantial evidence to support plaintiffs' unjust enrichment claim. Plaintiffs did not present substantial evidence to show they expected to be paid. On the contrary, there was uncontroverted evidence showing hospital officials told many of the plaintiffs that they would not be paid for their work. Because the patients labored without expecting payment, they cannot recover in quasi-contract.

Plaintiffs argue that lack of expectation is irrelevant because the State coerced them into working without pay. Where the coercive defendant is a private actor, the law on unjust enrichment supports the plaintiffs' argument.[12] We are not aware of any case in the country, however, in which evidence of *state* coercion has led to a successful claim of unjust enrichment. Where the state has used its coercive powers to seize property or services from a citizen without

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[11] Quasi-contracts are to be distinguished from both express and implied-in-fact contracts, which are traditional contracts. The matter is the subject of some confusion. *See Health and Hosp. Corp. v. Marion County* (1985), Ind. App., 476 N.E.2d 887 (rejecting party's petition for rehearing on grounds the party had confused contracts implied-in-fact with contracts implied-in-law).

[12] *See, e.g., Restatement of Restitution* § 70 (1937); *Baldwin v. Hutchison* (1893), 8 Ind. App. 454, 35 N.E. 711 (permitting a mentally deficient man to rescind a contract and recover in restitution money paid to a savvy businessman who had threatened, without good cause, to have the man thrown in jail for damaging statements he made under oath in court).

making just compensation, recovery is more typically based on a constitutional provision, such as the takings clause of the fifth amendment to the U.S. Constitution, or article I, § 21 of the Indiana Constitution. The reason for this is unclear, but may be related to the rule which says recovery cannot be grounded on a claim of unjust enrichment where a contract controls the rights of the parties. *Engelbrecht v. Property Developers, Inc.* (1973), 156 Ind. App. 354, 358, 296 N.E.2d 798, 801. The Indiana Constitution is, in a sense, a contract between the State and its citizens. Article I, § 21 of that Constitution obligates the State to pay just compensation for particular services rendered on demand to the State. Where it is alleged that the State demanded labor from its citizens and failed to make any compensation, a right to recovery, if one exists at all, ought to be based on that "contractual" provision, not on common law principles of equity.

Plaintiffs' unjust enrichment claim fails because they lacked a subjective expectation of payment.

III. Thirteenth Amendment

Having concluded that the judgment of the trial court cannot be affirmed on statutory or common law grounds, we turn to plaintiffs' constitutional claims. Plaintiffs' first constitutional claim rests on the thirteenth amendment to the United States Constitution. Section 1 of that amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Section 2 grants to Congress the "power to enforce this article by appropriate legislation." U.S. Const. amend. XIII § 2.

Defendants dispute plaintiffs' right to sue directly under the thirteenth amendment. They argue that suits can only be based on one of the statutes enacted by Congress under its § 2 authority. They cite several federal cases in support of this argument.[13]

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[13] *Clark v. Universal Builders, Inc.*, 409 F. Supp. 1274, 1279 (N.D. Ill. 1976) (dismissing claim based directly on thirteenth amendment in action against seller of homes who had allegedly discriminated against black purchasers); *Sanders v. A.J. Canfield Co.*, 635 F. Supp. 85, 87 (N.D. Ill. 1986) (dismissing plaintiff's employment discrimination claim based directly on the thirteenth amendment); *Westray v. Porthole, Inc.*, 586 F. Supp. 834, 838-39 (D. Md. 1984) (dismissing

Plaintiffs have countered with two contradictory responses. At trial, plaintiffs conceded that they were not seeking to make the thirteenth amendment claim an independent cause of action. In closing argument, counsel for plaintiffs acknowledged that "1983 provides the remedial vehicle through which that 13th Amendment cause of action is presented." Record at 2514. On appeal, however, plaintiffs resurrected the thirteenth amendment as an independent cause of action. Brief of Plaintiffs-Appellees at 56-57. Were plaintiffs able to recover fully under § 1983, it would not matter whether recovery could also be based directly on the amendment. Because § 1983 does not provide them any relief, however, this dispute becomes important.

We conclude suit may be based directly on the amendment when attacking slavery itself or other forms of compulsory labor akin to slavery. *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (amendment "by its own unaided force and effect . . . abolished slavery"); *Slaughter-House Cases*, 83 U.S. 36, 69, 71-72 (1873) (the term "involuntary servitude" abolishes peonage); *Butler v. Perry*, 240 U.S. 328, 332 (1916) (amendment covers "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results"). Though defendants are apparently correct that suits attacking the "badges and incidents of slavery" must be based on statute, suits attacking compulsory labor itself may rest on the thirteenth amendment. *Compare Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (under § 2, Congress may attack "badges and incidents of slavery" through legislation), with *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971) (refusing to hold the amendment itself is broad enough to abolish directly all "badges or incidents"). Those cases cited by defendants do nothing to dispel this distinction. All of the cases centered around "badges and incidents" of slavery and did not attack a system of compulsory labor. Here, of course, plaintiffs claim to be attacking a system of compulsory labor, not the mere "badges and incidents" of slavery.

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claim based directly on thirteenth amendment in suit against a nightclub that had refused to admit black patrons); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1012 (S.D. Tex. 1981) (suggesting the thirteenth amendment does not create direct cause of action); *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801, 806-07 (D. Md. 1980) (dismissing employment discrimination claim based directly on thirteenth amendment).

Where such is the claim, suit may be brought directly under the thirteenth amendment.

Resolving this point, however, does not mean the thirteenth amendment was actually violated, or that an award of damages is the proper remedy for such a violation. The Supreme Court has repeatedly held that "not all situations in which labor is compelled . . . violate the Thirteenth Amendment." *E.g.*, *United States v. Kozminski*, 487 U.S. 931, 943 (1988). The prohibition against involuntary servitude does not prohibit states from compelling their citizens to perform certain civic duties. *Hurtado v. United States*, 410 U.S. 578, 589-90 n.11 (1973) (payment of $1 a day to material witness while incarcerated to ensure appearance at trial does not violate thirteenth amendment); *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (compulsory service in armed forces does not violate amendment); *Butler v. Perry*, 240 U.S. 328 (1916) (upholding constitutionality of state law requiring all able-bodied adult male citizens to work on roads and bridges). Nor does the amendment apply to "certain descriptions of service which have always been treated as exceptional." *Robertson v. Baldwin*, 165 U.S. 275 (1897) (sailors may be compelled by force of law to complete voyage with ship). The Court explained the reasons behind the "civic duty" exception in *Butler v. Perry*:

> [T]he Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist. This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.

240 U.S. at 332-33. We think the facts of this case fit squarely

within this "civic duty" exception.[14]

Plaintiffs cite several cases which they contend hold that work performed by mental patients is within the scope of the thirteenth amendment. *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part and remanded in part sub nom.*, *Wyatt v. Aderolt*, 503 F.2d 1305 (5th Cir. 1974); *Weidenfeller v. Kidulis*, 380 F. Supp. 445 (E.D. Wis. 1974); *Arahovitis v. State*, 120 Misc. 2d 917, 466 N.Y.S.2d 928 (1983); and *Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966). We observe that the thirteenth amendment was not at issue in *Wyatt*,[15] and was not mentioned in *Arahovitis*. *Jobson* was a § 1983 case. The defendants in *Weidenfeller* were private hospitals, and that court incorrectly relied on *Jobson*. As a result, these cases have little persuasive value.

Finally, even if the thirteenth amendment were directly applicable in this case, it is not apparent that it would support an action for damages. The few actions brought directly under the amendment have sought either writs of habeas corpus or declaratory judgments. *See Peonage Cases*, 123 F. 671, 675 (M.D. Ala. 1903). Although the U.S. Supreme Court has held that damages may be obtained for direct violations of other constitutional amendments, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395-97 (1971) (fourth amendment) and *Davis v. Passman*, 442 U.S. 228, 245-48 (1979) (fifth amendment due process clause), it has never reached a similar

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[14] Our conclusion on the thirteenth amendment is buttressed by our analysis of plaintiffs' state constitutional claim. *Infra* at [A21-A32]. The two provisions share a common heritage. The framers of both the thirteenth amendment and article I, § 21 of the Indiana Constitution were strongly influenced by a provision in the Northwest ordinance prohibiting involuntary servitude. *See generally United States v. Shackney*, 333 F.2d 475, 483-84 (2d Cir. 1964) (discussing the history of the thirteenth amendment). We also note that the Supreme Court of Georgia refused to apply the thirteenth amendment to persons who performed work while under the care of that state's "benevolent institutions." *Kennedy v. Meara*, 127 Ga. 68, 56 S.E. 243 (1906).

[15] *See Wyatt v. Stickney*, 325 F. Supp. 781, 784 (prior opinion). The trial court there concluded that the poor standard of care in one of Alabama's mental hospitals implicated *unspecified* portions of the Constitution. In reaching this conclusion, the trial court cited *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). *Rouse* held that a mental hospital's poor standard of care could raise several constitutional questions, including procedural due process, equal protection, and the prohibition against cruel and unusual punishment. *Id.* at 453. *Rouse* did not, however, mention the thirteenth amendment.

conclusion with respect to violations of the thirteenth amendment. We decline to so hold.

Although we hold plaintiffs may sue directly under the thirteenth amendment, the judgment of the trial court cannot be affirmed on this basis.

IV. Indiana's Constitutional Protections

We come to plaintiffs' claim under § 21 of the Indiana Bill of Rights, which provides: "No person's particular services shall be demanded, without just compensation." Ind. Const. art. I, § 21. Plaintiffs claim the State violated this provision by forcing them to work without pay during their hospitalization. To prevail on this claim, plaintiffs must demonstrate: (1) that they performed particular services, (2) on the State's demand, (3) and did not receive just compensation.

Plaintiffs have presented substantial evidence that their work was rendered on the State's demand. The services they performed, however, were not particular services within the meaning of § 21. Moreover, by the measure of damages appropriate under § 21, plaintiffs have not been denied "just compensation."

A. Particular Services

The plaintiffs' evidence reveals that members of the class performed a variety of work activities while hospitalized. Patients worked in hospital kitchens fixing meals and scrubbing dishes, on the grounds cutting grass, in beauty salons cutting and styling other patients' hair, in a bowling alley maintaining the lanes and pinsetting machines, in administrative offices doing secretarial and clerical work, in the laundry washing sheets and clothes of other patients, in a garage repairing vehicles used at the hospital, in clinics bathing and feeding physically ill patients, and throughout hospital buildings scrubbing floors and cleaning.

For most patients these jobs were full-time. Five days a week the patients would rise in the morning, eat breakfast, go to work, break for lunch, stop work in the mid or late afternoon, return to their wards, eat dinner, and then relax in the evening. Considering this body of evidence, the question before this Court becomes: does such work fall within the meaning of "particular services" as that term is used in the Indiana Constitution?

This Court has regarded the task of interpreting particular provisions of the Indiana Constitution as a search for the common understanding of both those who framed it and those who ratified it. *Bishop v. State ex rel. Griner* (1898), 149 Ind. 223, 230-31, 48 N.E. 1038, 1040; *accord Kirkpatrick v. King* (1950), 228 Ind. 236, 242-43, 91 N.E.2d 785, 788. We have also said that "in placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy." *State v. Gibson* (1871), 36 Ind. 389, 391.

We turn first to the circumstances surrounding the adoption of the particular services clause at the constitutional convention. When the constitutional convention met in late 1850 and early 1851 to draft a new constitution, it considered provisions from a variety of sources, including the 1816 Constitution and resolutions submitted by the convention delegates. The 1816 Constitution contained a provision declaring that: "no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor." Ind. Const. art I, § 7 (1816).[16] One of the delegates to the 1850 convention offered a resolution directing the committee on rights and privileges to inquire into the expediency of adopting the 1816 provision as part of the new Constitution. I *Constitution Making in Indiana* 235 (1916, reprinted 1971). As reported out of committee on October 26, 1850, the provision read in relevant part: "No man's *personal* services shall be demanded without just compensation." 1 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850*, at 226 (1850) (emphasis added) [hereinafter *Debates*]. The matter apparently had been the subject of contention in committee, for a minority report was filed urging use of language

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[16] This provision appears to have been derived from a similar clause in the Northwest Ordinance. *An Ordinance for the government of the United States northwest of the river Ohio, July 13, 1787*, § 14, art. 2, *reprinted in* 1878 U.S. Rev. Stats. 13, 15 (2d ed.). Our 1816 provision and the Northwest Ordinance followed the Magna Carta and American colonial charters in permitting takings without compensation if the people's elected representatives consented. *See generally* Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 Cath. U.L. Rev. 847, 853-55 (1989).

nearly identical to that used in the 1816 Constitution. *Id.* at 226-27.

The Convention discussed what is now § 21 for six days. Much of the floor debate centered on the proper adjective to modify the word "services." Several delegates objected to the word "personal," believing that its breadth would prevent the State from requiring citizens to perform certain duties previously provided gratuitously. Those favoring the term "personal" argued that the old constitution had led to demands on the services of citizens which should have been compensated but were not.

The record of this lengthy debate over whether to use "personal" or "particular" provides insight into the meaning of § 21. For example, Mr. Clark from Tippecanoe County suggested that using the word "personal" would prevent the State from requiring citizens to attend militia training, or to work on road improvements in their immediate district without pay. *Id.* at 359. Mr. Bright feared the State would be required to pay for a citizen's participation in a posse comitatus. *Id.* at 359-60. Mr. Nave feared that using "personal" would require payment to those who testified before a grand jury. *Id.* at 367. Mr. Niles believed that the State would have to pay road supervisors, jurors and witnesses in criminal cases. *Id.* at 368. It was exactly this last point, failure to pay witnesses, which led many to support using "personal." Delegate Pettit said:

> Notwithstanding this provision, we have laws compelling a witness to go from end to end of the State, to testify in a criminal prosecution without compensation, unless the trial results in the conviction of the prisoner, a law which I look upon as being not only oppressive, but manifestly inconsistent with this provision of the Constitution.

Id. at 355.

Arguing for retention of the 1816 phrase "particular services," Mr. Clark offered a vague definition of "particular services" that has served as the primary test for distinguishing particular services from general ones. "I take it that the word *particular*, in the old Constitution, means, not that general service which every citizen is bound to render, but something specific -- something that is required of him as an individual, in contra-distinction to what is required, generally, of all citizens." *Id.* at 359.

Although some delegates were less clear on the exact meaning of "particular services," *see, e.g., id.* at 355 (delegate Pettit confessing

he did not know what was meant by "particular services"), others agreed that placing the 1816 language in the new constitution would reaffirm the status quo. "[T]here are many personal services required of individuals which never have been paid for, and which, I presume, it is not the intention of those who framed this section, should be paid for hereafter." *Id.* at 360 (delegate Bright from Jefferson county).

Even those who disagreed with retaining the word "particular" acknowledged the effect of retaining it. Delegate Chapman's position was representative:

> No word in any language, is more restrictive and constrictive than the word "particular" . . . .
>
> A multitude of services are now demanded of individual citizens, which ought to be paid for, though they are not, and probably will not be, under your amendment; for the action of the Convention in this particular, will be considered as a sanction of the past and existing state of things.

Id. at 400. The amendment to use the word "particular" was adopted by the delegates on a vote of 71 to 20. *Id.* at 387-88.

The convention's preference for "particular" over "personal" is critical in this case. It is clear that the framers did not intend this clause to create new rights to compensation for services provided to the State that had gone historically uncompensated.

This Court's decisions addressing the "particular services" clause follow the principles found in the debates. In *Israel v. State* (1857), 8 Ind. 467, this Court refused to require the State to pay fees to witnesses in criminal trials. Declining to further define the meaning of "particular services," the Court followed history. "The old constitution contained a like provision, but we believe it never was understood to extend to witnesses in criminal trials, and the provision in the new constitution should not be so understood." *Id.* at 468.

In *Blythe v. State* (1853), 4 Ind. 525, this Court reversed a finding of contempt against an attorney who refused to provide uncompensated legal services for a poor person charged with a crime.[17] This holding was repeated in *Webb v. Baird* (1854), 6

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[17] It is difficult to know what one should make of the Court's declaration that

Ind. 13, in which the Court noted that because attorneys no longer enjoy any special privileges or pecuniary emoluments under the law, "the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class." *Id.* at 17. (By contrast, of course, the claimants in this case received enormous benefits from the public.) The Court concluded that an attorney's legal services constitute his means of livelihood and are "no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic." *Id.*[18] Likewise, in *Buchman v. State* (1877), 59 Ind. 1, this Court held that doctors giving expert medical testimony at trial were entitled to be justly compensated. The Court distinguished between a witness who is called because he has observed matters under factual dispute and a witness who is called to give an expert opinion. The Court drew on the analysis in *Webb v. Baird* and said of the physician: "Is not his medical knowledge his capital stock?" *Id.* at 13.

This Court has also held that extra work performed by public officials whose salaries are set by statute does not constitute "particular services." *Board of Commissioners of Miami County v. Blake* (1863), 21 Ind. 32; *Falkenburgh v. Jones* (1854), 5 Ind. 296. Finally, we have held that bank officers obliged to spend part of their working day assisting tax auditors find business records relevant to the audit were not entitled to be compensated by the State for their labor. *Washington Nat'l Bank v. Daily* (1906), 166 Ind. 631, 77 N.E. 53. The *Daily* Court concluded that the time spent assisting the auditors was minimal and was a general service which all citizens owed to the state in order to further tax collections.

Ind. Rev. Stat., pt. 2, ch. 1, § 15 (1852) was unconstitutional under § 21. The statute authorized appointment of pauper counsel in civil cases only and could not have applied to the case before the Court. Attorney Blythe had been appointed to represent a defendant in a criminal case.

[18] The dissent cites *Webb v. Baird* as evidence of a willingness, in the very shadow of the 1850-51 Convention, to declare new rights to payment for services historically rendered free. Dissent slip op. at 10. Actually, the *Webb* Court was quite candid in acknowledging that there was no existing right to pauper counsel in criminal cases. The Court created that right in 1854 and, with it, the right to compensation.

With this understanding of "particular services" in mind,[19] we turn to the question at hand: Did the work performed by the plaintiff class constitute "particular services?" We conclude that it did not, for two reasons.

1. No History of Payment

Because the people of Indiana, acting through their delegates, chose to reaffirm historical practice with respect to payment for "particular services," we look first to this history. There is no historical evidence that mental patients were ever compensated for work performed while hospitalized in Indiana's mental institutions from the time of statehood to the filing of this lawsuit. All the evidence is to the contrary; Indiana's many laws concerning the mentally ill contemplated the use of patient labor without paying wages.

The earliest provision we have found concerning State responsibility for the care of the mentally ill is in the 1816 Constitution.

> It shall be the duty of the General assembly, as soon as circumstances will permit . . . to provide one or more farms to be an asylum for those persons, who by reason of age, infirmity, or other misfortunes, may have a claim upon the aid and beneficence of society; on such principles, that such persons may therein, find employment, and every reasonable comfort and lose, by their usefulness, the degrading sense of dependence.

Ind. Const. art. IX, § 4 (1816). This section clearly contemplates

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[19] Only Tennessee and Oregon have similar provisions in their state constitutions. Tenn. Const. art. 1, § 21; Or. Const. art. 1, § 18. Tennessee's Supreme Court uses a definition of particular that is similar to ours. "Particular services must mean peculiar services, limited services, not ordinary or general services of an individual. . . . It seems clear that ordinary services, such as may be required of all citizens or officials by general or valid special laws, are not particular services." *Henley v. State*, 98 Tenn. 665, 684, 41 S.W. 352, 355-56 (1897). The decisions about services are also similar. *See, e.g., Rushing v. Tennessee Crime Comm'n*, 173 Tenn. 308, 117 S.W.2d 4 (1938) (trial witnesses provide general, not particular, services and need not be paid); *Neely v. State*, 63 Tenn. 174 (1874) (jurors may be required to serve without pay). *But see Wright v. State*, 50 Tenn. (3 Heisk.) 256 (1871) (attorney may be required to defend prisoner without compensation).

that those committed might be allowed or required to work.

To discharge its responsibility under the 1816 Constitution, the General Assembly created a judicial process by which persons could be adjudged insane and placed under the care of guardians, who were empowered to invade the estate of the insane to pay for their care and the care of their families. *See, e.g.*, Ind. Rev. Stat. ch. 46, §§ 166-194 (1843). Once the estate was expended, or if there had been no estate to begin with, the insane were to be treated according to the poor laws then in effect. Ind. Rev. Stat. ch. 46, § 181 (1843). These poor laws permitted indigents to be committed to asylums and employed therein. Ind. Rev. Stat. ch. 19, § 37 (1843). They did not contain any provision for payment. This Court had recognized that persons under care of such schemes could be required to work towards their upkeep. *See Demar v. Simonson* (1835), 4 Blackf. 132. Care for the insane became more centralized once the General Assembly authorized the building of a hospital for the insane in 1846 and created a board of commissioners to oversee it. 1845 Ind. Gen. Laws 116 (ch. 118); 1846-47 Ind. Gen. Laws 99 (ch. 66).

The 1851 Constitution repeated the 1816 pronouncement that the General Assembly bore the responsibility of providing for the mentally ill. "It shall be the duty of the General Assembly to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and for the treatment of the insane." Ind. Const. art IX, § 1 (1851). It was the subject of short debate on the floor of the convention. The only inference which can be drawn from this debate is that there was opposition to financing state farms for the insane in addition to the existing hospital. 2 *Debates* at 1902-03.

In 1905, the legislature authorized establishing a village in New Castle to provide work for persons afflicted with epilepsy, which at that time was considered a mental illness. 1905 Ind. Acts 483 (ch. 159, § 1). In 1919, the legislature authorized creation of a farm colony, and specifically instructed the superintendent of the farm to utilize patient labor to construct it:

> It is declared to be the purpose and policy of the state with respect to the institution established by this act, that the buildings to be constructed for its use shall be plain and inexpensive in character and that the labor in constructing

> such buildings, improvements and facilities shall be supplied as far as applicable by the persons committed to the institution.

1919 Ind. Acts 480, 482 (ch. 94, § 6). Doctor William Murray confirmed at trial that mental patients actually worked under these laws. *See* Record at 1826-27.

Although many of these statutes make direct or indirect reference to patient labor, none mentions patient compensation. Indeed, there is no evidence in fact or law to suggest that Indiana had ever paid any patients for their work prior to this lawsuit. To be sure, unconstitutional acts do not become constitutional through age or repetition. In light of the decision of the framers of the 1851 Constitution to preserve the limited "particular services" clause as a reaffirmation of historical practice, however, we think the plaintiffs' assertion that § 21 invalidates this historical practice is untenable.

2. Patient Work Was "General" not "Particular" Services

Historical practice aside, there are significant distinctions between patient labor and particular services which prevent affirming the trial court's verdict.

The Indiana Constitution is a social compact among the people and between the people and their government. As part of this compact, citizens are required to yield property and general services to the State in loose exchange for the State's protections. This exchange is not a perfect one. Some citizens give the State much, but receive little in return; others receive much although they have given little. In drafting the Constitution, the framers understood that exchanges between the State and its citizens under this social compact would be uneven, and did not intend the particular services clause to prevent this outcome. Delegate Clark explained:

> There are other duties which belong to the State to perform towards citizens in their collective, political, and social condition. Whilst we are careful to recognize individual rights, and protect them, we must bear in mind that the State is the representative of the collective body, -- the guardian of the general welfare, as also, the protector of individuals. It must not be deprived of all sovereignty over individuals or

> their property, or in many instances, it would be powerless to do what is required of a sovereign state to perform.

1 *Debates* at 358.

Under article I, § 21, no one is entitled to a refund or an accounting as a remedy for a lopsided exchange under this social compact. In order to find for the plaintiff class in this case, we would be required to conclude that their work was not part of the social compact, but instead was the result of the State's isolated and unreasonable demand upon their services which ought to be paid for by the public at large. The facts of this case suggest, however, that the State's demand was neither isolated nor unreasonable. Like any other general service, the demand was but one of the many obligations that all citizens may be required to render to the State as part of the social compact.

The demand is not an isolated one. Care for the mentally ill is part of the bundle of services provided by the State to all Hoosiers. As part and parcel of this service, the people, through their elected representatives, have chosen to condition the benefit with a burden. In exchange for the benefit of state-run mental hospitals, we all bear the burden of contributing our labor to reduce the costs associated with our own hospitalization.[20] Just as only a few serve as witnesses, only a few end up in mental hospitals. No citizen is exempt from these requirements.

The State's demand was not unreasonable. The work requirement was reasonably related to the patients' hospitalization. The plaintiff class was, in many ways, the direct and primary beneficiary of its own labor. The plaintiffs performed tasks that improved their daily lives. Had the State required every patient to cook his own food and wash his own clothes, the connection between each patient and the benefit of his labor would have been undeniably clear. Although the State's decision to divide the tasks, specialize the labor and take advantage of economies of scale somewhat blurs the connection, the connection remains quite real. Work has been characterized as a "general service" when those performing the

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[20] This is not the only burden attached to the benefit. The State also requires patients with financial resources to pay for the cost of their care. Ind. Code § 16-14-18.1-3 (West Supp. 1990). Although article I, § 21 prevents the State from taking property without just compensation, plaintiffs do not argue that charging patients is an unconstitutional taking of property.

work have been the primary beneficiaries of the work product. For example, the "particular services" clause has never barred the practice of requiring men to work without pay for a few days each year on highway construction projects in the district in which they lived. *See* Ind. Rev. Stat. 339, ch. 16, § 101 (1843) (requiring male citizens to work two days each year); 1 *Debates* at 359 (such work is a "general service").

Plaintiffs not only benefitted from the fruits of their labor, but also from the very act of working. When the State refused to allow any mental patients to be assigned work between 1976 and 1977, the hospitals experienced a rise in the number of violent patient incidents, amount of tranquilizers prescribed, and the average patient stay. Record at 2375 & 1945. In addition, the staff noticed a general sense of confusion on the part of the patients about why they were no longer working. Record at 1981. The trial record contains many examples in which patients hospitalized between 1970 and 1974 progressed from a low-skill job within the institution to a paying job located off the hospital grounds. *See, e.g.*, Record at 1200-13, 1331-35, & 1947-48. The fact that work could benefit the plaintiffs in these ways makes the State's decision to work its patients all the more reasonable.[21]

The State's demand was also reasonable because it did not interfere with the plaintiffs' ability to earn a living. Because one of the purposes of the particular services clause is to protect a citizen's ability to earn a living, services that do not interfere with that ability have usually been characterized as general. *See, e.g., Webb v. Baird*, 6 Ind. 13; *Buchman v. State*, 59 Ind. 1; *Israel v. State*, 8 Ind. 467. Although the members of the plaintiff class worked a substantial number of hours over four years, the time spent working

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[21] The plaintiffs' evidence suggested that the State's procedures for diagnosing, assigning and supervising work were below the minimum medical standards and thereby rendered the work non-therapeutic. They presented evidence to show the patients had little contact with medical doctors, were not told why they should work, were coerced into accepting the work, had no on-the-job supervision from medical personnel, and did not perceive that they benefitted from their work. The State presented conflicting evidence to show that its procedures for assigning, encouraging, and supervising the patients' work met prevailing medical standards. This debate over prevailing medical standards does not detract from other uncontroverted evidence which shows that specific benefits resulted from the plaintiffs' work.

did not detract from their ability to earn a living.

B. Plaintiffs Worked on the State's Demand

We have never before considered how coercive the State's request for services must be to become a "demand," but the U.S. Supreme Court's analysis of the type of coercion required to render servitude "involuntary" under the thirteenth amendment is instructive. We think a request becomes a "demand" when it is backed up with the use or threatened use of physical force or legal process which creates in the citizen a reasonable belief that he is not free to refuse the request. *See generally United States v. Kozminski*, 487 U.S. 931 (1988).

To establish that the State demanded work from the 7400 members in the class, the plaintiffs presented the testimony of eleven former mental patients and two expert witnesses. The 7400 plaintiffs were hospitalized in ten state mental hospitals. The eleven patients who testified at trial or through deposition offered the only evidence about the extent of coercion used to induce 7400 patients to work. Not one of the eleven witnesses ever refused to work, although many believed that other unidentified patients had done so with drastic consequences befalling them.[22] Nevertheless, under our forgiving standard of review, the trial court could have found that the State "demanded" work of the patients. The State clearly initiated the process of putting patients to work. With respect to involuntarily-committed patients, the State's requests were backed up with the use or threatened use of this legal process. A patient could reasonably believe that a refusal to work might result in a delayed release from the institution.[23] With respect to voluntary

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[22] The testimony of one of the male plaintiffs is representative:

> Q: If you refused to [work], what would have happened?
>
> A: I would have been sent back to maximum security and placed in isolation.
>
> Q: You were told this?
>
> A: I was told that, let's say, directly and indirectly, many times during – I had been at the institution approximately a year at that point, and I had seen it happen many times when an individual refused to work, refused to do what he was told to do, he was either given drugs and put in isolation or one or the other.

Record at 1204.

[23] A plaintiff who had been involuntarily committed testified that he was told by an unidentified person that he "had to work in order to gain [his] freedom."

committees, the persistent rumors that disobedience of any kind was punished with a loss of privileges, isolation, and electric shock created a coercive atmosphere that reasonably led patients to believe that they were not free to refuse work.[24] Although there is *no* evidence that any patients were actually punished in these ways for refusing work, there is substantial evidence that rumors were persistent among the patient population. Considering the impaired mental condition of the plaintiffs and the extent of the State's control over the patients' lives, we think the evidence is adequate to establish a "demand" by the State.

C. "Just Compensation"

Even if we had determined that the plaintiffs' work did constitute "particular services," the relief to which they would be entitled is "just compensation." This Court has never discussed how "just compensation" is to be measured under the particular services clause. There are many opinions, however, analyzing how "just compensation" is to be measured under the clause in § 21 which governs takings of property. Plaintiffs correctly note that both clauses use the same phrase:

> No person's particular services shall be demanded, without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

Ind. Const. art. I, § 21. Plaintiffs contend that "the phrase 'just compensation' must be construed consistently within Article I § 21 . . . ." Brief in Support of Plaintiffs-Appellees' Petition for

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Record at 1200.

[24] A female plaintiff's testimony confirms that the fear of punishment for refusing work was common:

> Q: Did [the hospital staff punish] patients when they did something bad or something they didn't want them to do?
> A: Yes, sir.
> Q: Do you know whether they [punished] anyone who refused to work?
> A: I don't know, but I was scared not to do it.
> Q: You saw it going on and didn't want to take any chances?
> A: Right.

Record at 1354-55.

Transfer at 14. Our case law supports this rule of constitutional construction. "The general rule is that the same words occurring at different places in a constitution will be given the same meaning unless the context requires a different meaning." *Kirkpatrick v. King* (1950), 228 Ind. 236, 246, 91 N.E.2d 785, 789. Thus, we will examine how "just compensation" is measured under the takings clause.

The convention delegates spent a good deal of the six days devoted to § 21 debating how to calculate "just compensation" for a taking of property. They debated two aspects of the compensation question: timing of payment and method of assessing damages. The delegates chose to change the timing of payment, deciding that before property could be taken compensation must be first assessed and tendered. 1 *Debates* at 430-31. By contrast, the delegates argued vehemently about the method of calculating just compensation and decided to retain the method as it had existed under the 1816 Constitution.

Indiana Supreme Court decisions on the method of assessing compensation followed a remarkably straight line. The Court consistently held that the 1816 Constitution required only that a claimant be paid the value of the property taken, plus the value of any damage done to the remaining property as a result of the taking, less the value of any benefits accruing to the remaining property as a result of the taking. *See, e.g., McIntire v. State* (1840), 5 Blackf. 384; *Digby v. State* (1841), 5 Blackf. 541; *Vanblaricum v. State* (1844), 7 Blackf. 209. The Court acknowledged that this was a proper measure of "just compensation" even in cases where the benefits conferred exceeded the damages:

> In ascertaining the extent of the injury, undoubtedly, an estimation of the value of the property taken, at the time of taking, is a necessary step; but if the benefits really and substantially resulting to the claimant, equal, in pecuniary value, the value of that of which the public has deprived him, we conceive they constitute a just and constitutional [*68] compensation for the deprivation to which he has been subjected; and such, in our opinion, is the nature of the benefits contemplated by the statute in question -- the enhancement of the value of property by the construction of a public improvement.

McIntire v. State, 5 Blackf. at 387.

This method of using benefits to offset damage from the taking was frequently called the "extrinsic benefits rule." The Court noted that this had been the rule in Indiana since 18th century territorial days and said of those who drafted the 1816 Constitution's just compensation clause:

> [W]e can not doubt that its authors, in providing that "just compensation" should be made for private property taken for public use, designed to convey the meaning which had been attached to that phrase by the community for more than seventeen years, and which has since remained unquestioned for a longer period of time.

Id. at 386-87.

The decisions of Indiana's trial courts and of this Court on calculation of compensation under the 1816 Constitution were well known to some delegates and played a prominent role in the floor debates. Indeed, one delegate read portions of this Court's compensation decisions aloud on the floor. *Id.* at 360-61 (delegate Bright reading from *Rubottom v. M'Clure* (1838), 4 Blackf. 505; 507, 508-09).

Some delegates disliked this Court's interpretation of the 1816 Constitution on this point, and wanted new constitutional language to alter it. Delegate Bright declared: "The great evil under the provision in the old Constitution resulted from this mode of paying assessed damages." 1 *Debates* at 362. Bright cited a case in which the jury concluded that the benefit of a public improvement to an owner's adjacent land entirely offset the value of the land actually taken and awarded the owner nothing; he called this "radically wrong." *Id.*[25] Bright asked the Convention to correct this wrong by adopting new language to alter the way "just compensation" was calculated: "No man's particular services shall be demanded, or property taken or applied to public use, against his consent, without a just compensation in money, irrespective of extrinsic benefits, being made therefor." *Id.* at 361 (emphasis added). Bright's complaint about this meaning of the 1816 Constitution found many

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[25] There was in fact such a case, *Vanblaricum v. State* (1844), 7 Blackf. 209, though it was overturned on appeal and a new trial ordered.

followers.

Other delegates favored retaining the 1816 language. They asserted two grounds. First, some delegates relied on what might be called today the "no-harm-no-foul" rule. Speaking about a farmer part of whose land might be taken by a public improvement, delegate Kilgore said that "if the value of the owner's farm is to be enhanced by it, the property taken can be nothing but an imaginary wrong to the owner." 1 *Debates* at 354. Particularly relevant to the instant case, delegate Barbour opposed Bright's amendment because it would require taxpayers to pay claimants whose extrinsic benefits exceeded their damages. 1 *Debates* at 373. Second, as in the debate over the 1816 term "particular services," there was sentiment in favor of simple continuity. Said delegate Kilgore:

> I suppose that there is not a single section in the old Constitution upon which there has been more litigation than upon the one now under consideration, and the decisions of the courts thereupon are well understood, so that now if we propose a radical change in this provision, it could not but operate prejudicially to all the interests of the State, except the interests of the individual who chooses to remain wholly unwilling to surrender anything for the public good.

1 *Debates* at 353.

Delegate Bright and others mounted repeated attempts to abolish the extrinsic benefit rule, but the convention repeatedly refused to do so and stood by the language from 1816. *See, e.g.*, 1 *Debates* at 374. The courts have honored this decision. Twice since the adoption of the 1851 Constitution, this Court has held that § 21 maintained the extrinsic benefit rule as it existed in the 1816 Constitution. *Hagaman v. Moore* (1882), 84 Ind. 496, 500; *Indiana Central R.R. v. Hunter* (1856), 8 Ind. 74, 78.[26] If the State is

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[26] *See also Rassier v. Grimmer* (1891), 130 Ind. 219, 224 ("benefits enuring to the land by reason of the location of the highway equalled the damage caused by the easement imposed, and hence there was 'no damage'"). The legislature, of course, may order that compensation be paid in excess of this constitutional minimum. It has done just that in a variety of statutes governing acquisition of property. *See, e.g.*, 2 Ind. Rev. Stat. 193, § 711 (1852) (benefits accruing to remainder cannot be used to offset extent of the taking); 1905 Ind. Acts 59 (ch. 48, § 6) (codified at Ind. Code Ann. § 7685 (Burns 1926)); 1935 Ind. Acts 228 (ch. 76, § 3); 1982 Ind. Acts 1431-32 (Pub. L. No. 187, § 169) (benefits may be used

constitutionally permitted to use extrinsic benefits conferred on a property owner to offset losses for property taken, the use of identical language in both clauses of § 21 compels application of the same principle when the State demands particular services. Thus, in calculating "just compensation" under the particular services clause, claimants are entitled to recover the value of the particular services rendered less the value of any benefits accruing to them as a result of their work.

Value of the Services. The trial court calculated the value of the patients' labor by multiplying the number of hours each patient worked by $1.60, the federal minimum hourly wage under the FLSA during the time the plaintiffs were working. Collectively, the patients worked around 8.7 million hours, putting the value of their work at nearly $14 million.

The FLSA, of course, did not apply to employees working in State mental hospitals. Thus, this minimum wage can serve only as evidence of the value of the plaintiffs' work. Whether the evidence supporting $1.60 per hour as the value of plaintiffs' work can be called "substantial" is open to doubt. The type of work performed by the patients was mostly low-skill, manual labor. All patient jobs were categorized by the patient remuneration board into thirteen basic types: dietary helper, maintenance helper, clothing room helper, and so on. Those jobs which required the most skill, like technical, clerical or maintenance helpers, employed few patients. For example, of the 376 patients who worked at Beatty Memorial Hospital in 1970, only eight worked as maintenance helpers, seven as technical helpers, and one as a clerical helper. The plaintiffs who testified at trial confirmed that their work was mostly low-skill manual labor. During the patient remuneration board's initial meetings in the early 1970's, it set the FLSA minimum wage as the *maximum* rate for patient work. The board planned to multiply this rate by a productivity percentage to arrive at a patient's final hourly wage rate. Thus, under the board's payment plan, a patient who was performing at a 50% productivity rate would be entitled to 50%

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only to offset damage to residue resulting from a taking by State or county for a highway or by a municipal corporation for public use) (codified as amended at Ind. Code § 32-11-1-6 (West Supp. 1990)). The only statute ordering compensation above the constitutional minimum for services was the patient remuneration law. As we indicated above, it is not a basis for affirming the trial court's judgment.

of $1.60 per hour. This productivity discount is also contemplated under the FLSA. 29 U.S.C. § 214(c) (1988). Although there is little evidence in the record to suggest what specific productivity percentage should be used, it is apparent that plaintiffs were performing at a lowered productivity rate.

Extrinsic Benefits. In awarding just compensation under § 21, the value of the benefits conferred on the plaintiffs must be subtracted from the value of their work. The trial court allowed no offset although there was uncontroverted evidence of several benefits accruing to the plaintiffs. The first benefit from the patients' work was the improved environment in which the patients lived. Almost all of the plaintiffs performed work for the patient population. Each working plaintiff directly benefitted from the fact that another plaintiff was preparing food for his consumption, washing his clothes, and cleaning the floors of his ward.

The second benefit was the State's provision of food, shelter, and care for the members of the class. This benefit provided by the State was significant, valued at around $240 million at the time of trial as demonstrated in exhibits erroneously excluded by the trial court.[27] If they rendered particular services, the plaintiffs are entitled to just compensation -- not a windfall. If they should have

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[27] The State sought to establish the amount of outstanding bills owed by each member of the class and called the reimbursement director of the Department of Mental Health, who was keeper of the original records. The State acknowledged that the evidence was not such proof as might be necessary to prove a counter-claim. Instead, it contended that if the trial court ultimately held that the class was entitled to recover under the patient remuneration law, it would necessarily need to know how much of the recovery should go to the patient and how much to the State for "charges of the hospital for maintenance, care, and treatment of the patient, to the extent of the actual charge." Record at 2210-13, 2221; 1971 Ind. Acts at 2127 (Pub. L. No. 474, § 4(d)). The trial judge sustained plaintiffs' objection to the State's exhibit, apparently believing that § 4 of the act entitled the patient to retain all of his earnings unless it could be proven that his unpaid hospital bill exceeded his earnings during each month he worked. Record at 2212. The act does not contain such a limitation and it was error to exclude the State's exhibit on this basis. While plaintiffs objected on other grounds, such as the fact that the exhibit contained summaries, their complaint is entitled only to modest attention in light of the nature of their own proof. Thousands of the hours in their claim are not supported by any evidence at all that the named patient worked; they are based on averages calculated from other patients. Plaintiffs' arguments about the meticulousness of the State's paperwork must be considered in light of the fact of plaintiffs' failure to plead their § 21 constitutional claim.

been paid for their work, then all of the direct benefits accruing to them as a result of this work must also be considered.

Although there is no direct evidence from which to calculate the exact worth of the first of these two benefits, it is apparent that the two combined exceed the value of the plaintiffs' labor.[28] Indiana's rule of constitutional law has been that where the value of extrinsic benefits exceeds the value of the property or services demanded, no cash compensation is due.

IV. Conclusion

Having rejected all six of the plaintiffs' grounds for recovery, we do not reach the subsidiary issues raised in the parties briefs to this Court, such as the amount of attorneys fees awarded, the award of pre-judgment interest, and the distinction between an award of damages and back wages. We reverse the judgment of the trial court and remand with instructions to enter judgment for the defendants on all counts.

DICKSON, J., dissenting:

I respectfully dissent from the majority opinion's analysis of the plaintiffs' claims under the Fair Labor Standards Act (FLSA) and those asserting violation of the state and federal constitutions.

1. Fair Labor Standards Act

The majority finds the issue of retroactivity determinative in rejecting the plaintiffs' claim that the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, required the State to pay them for their work. Suit on this matter was originally filed in 1974 to secure compensation for labor performed for Indiana mental institutions

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[28] The $ 240 million due the State included charges for care rendered to patients for years outside the 1970-74 period at issue. This evidentiary difference might be material if the value of the extrinsic benefits were not eight times the value of the services.

from May 23, 1970, through December 31, 1974. The trial Court entered judgment for the plaintiffs in 1987. At all of these times, the plaintiffs were within the protections of the FLSA by reason of its 1966 amendments extending coverage to employees of state hospitals and institutions for the residential care of the mentally ill. Fair Labor Standards Amendments of 1966, Pub.L.No. 89-601 §§ 102(a),(b), and (c), 80 Stat. 830, 831 (codified as amended at 29 U.S.C.A. §§ 203(d)(r) and (s)(5)(1978). The application of the FLSA to government hospitals was ruled to be within Congress' power under the Commerce Clause. *Maryland v. Wirtz* (1968), 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020. In June of 1976, the United States Supreme Court reversed *Wirtz* and voided the application of the FLSA to government employees engaged in traditional governmental functions. *National League of Cities v. Usery* (1976), 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245. However, the Court subsequently reversed itself again, and expressly overruled *National League of Cities*, thus reinstating *Wirtz*. *Garcia v. San Antonio Metro. Transit Auth.* (1985), 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016.

In order to reverse the trial court, the majority opinion gives retroactive application only to *National League of Cities* but denies *Garcia* a parallel application. The majority attempts to justify this inconsistency by finding *Garcia* non-retroactive under the three-factor test enunciated in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. The usual rule is that cases should be decided in accordance with the law existing at the time of decision unless consideration of the three *Chevron* criteria requires nonretroactive application. *Goodman v. Lukens Steel Co.* (1987), 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572. In the present case, the law existing at the time of the decision was that of *Wirtz* and *Garcia* recognizing the constitutional validity of the FLSA provisions which applied minimum wage requirements to protect certain state government employees, including the plaintiffs.

In order for the first *Chevron* factor to support a claim of nonretroactivity, the *Garcia* decision must not only overrule clear past precedent, which it did in reversing *National League of Cities*, but also must such precedent be one "on which litigants may have relied." *Chevron*, 404 U.S. at 106, 92 S.Ct. at 355, 30 L.Ed.2d at 306. A major weakness of the majority's rationale is its finding that the reliance element was met by the State's failure to seek a

declaratory judgment after 1976 when *National League of Cities* was decided. Despite the majority's conjecture as to the State's possible reliance upon *National League of Cities* following 1976, the inescapable fact remains that during 1970 to 1974, when the plaintiffs were providing labor without any compensation, the then-existing law entitled them to the minimum wage protections of the FLSA, and the State could not have then relied upon *National League of Cities* which was not decided until 1976. Absent such reliance, the first *Chevron* factor cannot support the refusal to give *Garcia* the customary retroactive application.

The second factor favoring nonretroactivity requires an analysis of "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Chevron*, 404 U.S. at 107, 92 S.Ct. at 355, 30 L.Ed.2d at 306. Here the "rule in question" is the *Garcia* holding that the FLSA wage and hour provisions, as applied to state and local governments, are not violative of any constitutional provision. I cannot subscribe to the majority's view that retroactive application, permitting the enacted protections of the FLSA for state workers, would retard the purpose and effect of the minimum wage provision. The contrary is true.

As to the third *Chevron* factor, the majority opines that retroactive application of *Garcia* would produce substantial inequitable results because of the failure of a contemporaneous suit for FLSA benefits. In *Brennan v. Indiana* (7th Cir. 1975), 517 F.2d 1179, *rev'd sub nom, Indiana v. Usery* (1976), 427 U.S. 909, 96 S.Ct. 3196, 49 L.Ed.2d 1202, the plaintiffs were paid employees of the Indiana Department of Mental Health seeking overtime pay under the FLSA. In finding "substantial inequitable results" between the patients and the staff of the hospitals, the reasoning of the majority is flawed in two respects. First, the plaintiffs in *Brennan* suffered an untimely dismissal following appellate reversal because the intervening *National League of Cities*, since overruled, was retroactively applied to reverse their favorable judgement. But such an unfortunate and (absent *National League of Cities*) erroneous result for the hospital employees in *Brennan* does not necessarily compel an additional erroneous decision for the present plaintiffs. Two inequities are more substantial than one. Second, the level of harm suffered by the plaintiffs in the present case differs dramatically from that suffered by the plaintiffs in *Brennan*. In the latter

instance, the employees were at least paid basic wages, and were deprived only of their claim for overtime compensation. The present plaintiffs received no wages whatsoever for their labors, and now seek at least the federally mandated minimum wage. Permitting the patient/workers to be denied all compensation for a period during which regular employees were paid basic wages but denied overtime benefits does not constitute the "substantial inequitable results" necessary for the third *Chevron* factor. Thus, *Garcia* should not be deprived of its retroactive application.

The majority finds "compelling" the eventual outcome in *Garcia*. I disagree. The plaintiff in *Garcia* was seeking application of the FLSA for labor performed after the 1976 decision in *National League of Cities*, when the San Antonio Metropolitan Transit Authority (SAMTA) notified its employees that it would no longer abide by the FLSA's maximum hours and overtime provisions. In fact, SAMTA obtained a declaratory judgment that its public mass transit system was protected from federal regulation following *National League of Cities*. Thus in refusing to comply with the FLSA, SAMTA was acting in reliance upon both the Supreme Court's 1976 decision in *National League of Cities* and the subsequent declaratory judgment. It is little wonder that, following remand from the Supreme Court, it was determined that SAMTA "was relying on the general framework provided by *National League of Cities*, as it undoubtedly had a right to do." *Garcia v. San Antonio Metro. Transit Auth.* (5th Cir. 1988), 838 F.2d 1411, 1418. Although finding the first prong of *Chevron* to require nonretroactive application of *Garcia*, the federal circuit court indicated its agreement with the trial court's finding that the second *Chevron* factor neither favors nor opposes retroactive application of *Garcia*. 838 F.2d at 1418-19. In reviewing the third *Chevron* factor, the court found that the equities favored nonretroactivity, noting that

> First, huge back-pay awards may very likely cripple the always closely budgeted municipal funds. There is a great difference between, on the one hand, knowing you are subject to a regulation, planning for it and taxing and charging the public for it all along, and, on the other hand, suddenly finding out that, contrary to precedent of the Supreme Court and the decisions of the district court, you have been subject

> to a regulation for several years and are required to compensate under that regulation for previous years for which tax monies have already been otherwise allocated and spent. Of course, the municipalities and the taxpayers have in some ways benefitted from their exemption from the FLSA. However, the equities do not justify saddling them with huge back-pay liabilities *when they acted in good faith during all those years, believing for substantial precedential reasons that they were exempt from the FLSA*, ...

Garcia, 838 F.2d at 1420 (emphasis added). The second reason given was that overtime compensation to SAMTA employees was at least presumptively partially received in other forms because SAMTA "must compete for labor in the marketplace against employers who are subject to the FLSA, and so it could not simply subtract the benefits required by the FLSA from its own programs." *Id*. Neither of these equitable considerations has any application to the present plaintiffs. Unlike SAMTA, the State of Indiana obtained the plaintiffs' labors before *National League of Cities* was decided. Because the then-prevailing law would have entitled the patient/-workers to FLSA protection, the State cannot be said to have "acted in good faith during all those years, believing for substantial precedential reasons that they were exempt from the FLSA" as they allocated closely budgeted government resources. The second SAMTA equitable consideration is likewise unavailable in the present case. The State of Indiana was obviously not competing for the patients' labor "in the marketplace against employers who are subject to the FLSA." Rather, the patients literally constituted a captive labor force. For these reasons, while the *Chevron* analysis permitted SAMTA, in good faith reliance upon *National League of Cities*, to avoid paying overtime benefits after 1976, it does not justify the refusal of the State of Indiana to pay FSLA minimum wage benefits to the present plaintiffs for work demanded and obtained in the absence of such reliance.

The better reasoning, which finds that the *Chevron* test requires retroactive application of *Garcia* to reinstate FLSA protections for the plaintiffs, is additionally bolstered by the principle that the party seeking to avoid retroactive application of a decision bears the burden of persuasion. *Ackinclose v. Palm Beach County* (11th Cir. 1988), 845 F.2d 931, 933. The State has wholly failed in its

burden of persuasion as to any of the three *Chevron* criteria. For these reasons, I respectfully dissent from part II (C) of the majority opinion.

2. Involuntary Servitude

I am likewise unable to join the majority's analysis of the plaintiffs' claim for damages resulting from their involuntary servitude in violation of the Thirteenth Amendment to the Constitution of the United States and Article 1, Section 37 of the Constitution of Indiana. Noting that the plaintiffs' claim here attacks a system of compulsory labor, the majority recognizes that suit may be brought directly under the Thirteenth Amendment, but finds that the nature of the plaintiffs' compulsory service falls within a "civic duty" exception permitting governments to compel citizens to perform certain civic duties such as jury service, military service, and road work.

In contrast, several other jurisdictions have found otherwise. *Weidenfeller v. Kidulis* (E.D.Wis. 1974), 380 F.Supp. 445 (forced labor of certain individuals, including the mentally disabled, amounts to involuntary servitude and therefore is violative of Thirteenth Amendment); *Stone v. City of Paducah* (1905), 120 Ky. 322, 86 S.W. 531 (compelling labor from persons confined as "idiots, insane persons, and inebriates" would be involuntary servitude in violation of the Thirteenth Amendment); *Downs v. Dept. of Public Welfare* (E.D.Pa. 1973), 368 F.Supp. 454 (forced labor at state mental hospitals may be violation of Thirteenth Amendment); *Johnston v. Ciccone* (W.D.Mo. 1966), 260 F.Supp. 553 (forced work by confined mental patient without compensation would violate Thirteenth Amendment); and *Jobson v. Henne* (2d Cir. 1966), 355 F.2d 129 (inmate of state mental institution entitled to trial on claim that compulsory work allegedly constituted involuntary servitude).

Therefore, I do not share the majority's conviction that the facts of the present case "fit squarely" within the civic duty exception. The requirement of extended full-time work was not imposed upon all citizens equally. Rather, I find it more reasonable to conclude that the nature and extent of labor compelled from the plaintiffs was far beyond "civic duties" and amounted to an actionable violation of the constitutional proscriptions against involuntary servitude.

3. Right to Just Compensation for Demanded Services

I further dissent from the majority opinion's analysis of the plaintiffs' claim under Article I, Section 21 of the Constitution of Indiana, which provides, in part:

> No person's particular services shall be demanded, without just compensation.

The majority correctly recognizes that the evidence at trial was adequate to establish that the plaintiffs' uncompensated labor was demanded by the State, but finds that the plaintiffs' work did not constitute "particular services" and that the plaintiffs were not denied "just compensation."

The majority recognizes that the plaintiffs were required to work full-time jobs as kitchen workers, groundskeepers, barbers, maintenance workers, secretaries, launderers, mechanics, hospital workers, and janitors, but finds that such work did not constitute "particular services" under the constitutional provision. Critical to the majority's resolution of this issue is its belief that in choosing the phrase "particular services" rather than "personal services," the 1850-51 Indiana Constitutional Convention necessarily intended to create no new rights to compensation which had gone historically uncompensated.

Such was not the view of this Court just three years after the convention debates upon which the majority relies. In *Webb v. Baird* (1854), 6 Ind. 13, there was no apparent hesitation in declaring that a pre-convention (1843) statute authorizing courts to assign counsel to gratuitously defend paupers would fall to § 21 should a conflict be presented. In addressing whether the 11-year-old statute could require an attorney's services to defend a pauper without any reward in the face of the newly re-adopted § 21 of the Constitution of Indiana, the Court declared: "the inferior law must yield to the superior," and found the constitutional provision would not allow courts to assign attorneys to defend poor persons for free, an obligation existing prior to the 1850-51 Convention. Thus, contrary to the majority's assertion, prevailing Indiana jurisprudence at the time of adoption of § 21 included a willingness to "create new rights to compensation for services provided to the state that had gone historically uncompensated."

Furthermore, the majority's treatment of "particular services"

fails to sufficiently recognize that such phrase was utilized to identify services not equally required of all citizens. In 1856, this Court rejected an argument that witness fees constituted "particular services" which may not be constitutionally demanded without just compensation for the reason that such services were equally required of every citizen.

> [B]ut we are prepared to say, that the services of witnesses in criminal cases are not particular, but are of the class of general services which every man in community is bound to render for the general, as well as his own individual good. It is as much the duty and interest of every citizen to aid in prosecuting crime, as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial. These are matters of general interest and public concern, -- are vital, indeed, to the very existence of free government, and render the services of witnesses on such occasions matters of general public interest, and not particular, in the sense of the constitution.

Israel v. State (1856), 8 Ind. 467, 468. The plaintiffs call our attention to the comments of Mr. Clark, which included:

> I take it that the word *particular*, in the old Constitution means, not that general service which every citizen is bound to render, but something specific - something that is required of him as an individual, in contra-distinction to what is required, generally, of all citizens.

1 *Debates In Indiana Convention of 1850*, at 359 (1935) (emphasis in original). Others expressed similar views during the convention. For example, Mr. Niles stated:

> I prefer the old word *particular* to the word *personal* used by the committee, as it will distinguish between such services and those general services which all good citizens owe to the State in protecting the interests and preserving the good order of society.

Id. at 368 (emphasis in original). Likewise, Mr. Clark added:

> There are duties which *all* citizens are occasionally called on to perform; services which the necessities of the State demand *alike from all*; obligations which *all* citizens owe to their government, the common defense of all.

Id. at 371-2 (emphasis added).

Working at the state's mental institutions was not required of all citizens. The labor of patient/workers was not demanded for merely a few days each year. Rather the state required, without compensation, plaintiffs' full-time work during much of their confinement at a mental institution. Such demand should be viewed as falling within the "particular service" which our Constitution prohibits without just compensation.

I find particularly unfortunate the majority's rationale for finding that the plaintiffs' right to just compensation is precluded by inferred extrinsic benefits.

From its review of the convention debates resulting in the inclusion of § 21 in the 1851 Indiana Constitution, the majority Concludes that extrinsic benefits are constitutionally permitted when assessing damages for the taking of a person's property without just compensation, and that parallel application requires that extrinsic benefits also be considered in determining damages for a person's particular services demanded without just compensation. But application of this conclusion to the present facts does not compel the result reached by the majority.

In the instance of claims seeking just compensation for *property* taken by law, extrinsic benefits are considered to the extent that the pecuniary value of a *person's remaining property* is enhanced. Such a claim for just compensation is not reduced because of general, non-pecuniary enhancements in "improved environment." Parallel application to claims seeking just compensation for *particular services* demanded by law would require that the extrinsic benefits to be considered are restricted to the pecuniary benefits to the *person's remaining services*, and not improved environment. Thus if the manner of using the demanded labor resulted in increased marketable skills or experience thereby conferring an enhanced value upon the patient/worker's particular services, or labor skills, such extrinsic benefits could be considered in determining damages for just compensation. But there should be no reduction for general, non-pecuniary enhancements in improved environment.

The State does not argue that the evidence demonstrates a pecuniary enhancement of the value of plaintiffs residual labor skills. Therefore there is no proper basis to conclude that plaintiffs have already received "just compensation."

The proper use of benefits in determining "just compensation" was thoroughly reviewed and, to the extent possible, resolved in *State v. Reid* (1933), 204 Ind. 631, 185 N.E. 449. Following a review of existing precedent, speeches of the various delegates at the constitutional convention, and the action of the General Assembly the following year when it passed an act preventing the consideration of extrinsic benefits, the *Reid* court concluded:

> We consider the just compensation clause to be primarily a restriction on the power of the legislature for the protection of private property. It is not a specific rule to measure the amount of damages, and we believe there is a margin of discretion for courts and legislatures in determining what specific rules should be adopted to insure just compensation. In view of the obvious margin of uncertainty inherent in any effort to estimate money value of benefits we cannot say, as a matter of law, that the requirement of "just compensation" will not be attained more often by a rule excluding benefits than by a rule requiring benefits to be considered. On the other hand we could not say, as a matter of law, that the legislative rule requiring benefits to be considered would violate the "just compensation" clause.

204 Ind. at 638, 185 N.E. at 451-52. We need not revisit history and alter this considered analysis. Whether extrinsic benefits are to be included in determining "just compensation" under § 21 is thus a matter for legislation. When the plaintiffs' particular services were demanded in 1970-1974, just such a legislative policy determination existed in the Patient Remuneration Act, which the majority declines to enforce in part II(B) of its opinion. Absent legislative determination, extrinsic benefits are not a necessary constitutional component of "just compensation."

Furthermore, the majority opinion inappropriately presumes from a silent record that the State proved extrinsic benefits which exceeded the value of the compelled particular services rendered by the plaintiffs, apparently relying upon evidence "offered to show existing amounts due for the cost of care and maintenance of a

substantial number of the individual plaintiffs." Brief of Appellants to the Court of Appeals at 87. This evidence was excluded by the trial court. On appeal, the defendants complained of its exclusion only with respect to the plaintiffs' claims under the Patient Remuneration Act, not as to any other of plaintiffs' claims. Brief of Appellants to the Court of Appeals at p. 4. I cannot agree with the majority's declaration that said evidence was erroneously excluded or its belief that such provides a basis to reverse the trial court and enter judgment for the State.

This is not to suggest that I oppose consideration of proper claims which the State may have in the event of unpaid accounts resulting from services rendered for the State's provision of food, shelter and care for members of the class. Our legal system provides an appropriate mechanism for such claims to be asserted and proven at trial. However, in this appeal the State does not contend that trial court error prevented it from the legitimate presentation of such claims except as to claims under the Patient Remuneration Act. The State filed a counterclaim (Record at 156) but withdrew it before trial (Record at 406-7). The contents of counterclaim are not disclosed in the record.

For most of four years, the plaintiffs' coerced labor was provided for our state mental institutions without wages or other demonstrated compensation. In what we proudly call the Bill of Rights in the Indiana Constitution, § 21 unequivocally declares that a person's particular services shall not be demanded without just compensation. And § 12 of the Bill of Rights assures that every person shall have remedy by due course of law. The plaintiffs have asked the courts to recognize their constitutional right to just compensation and to afford a remedy. With today's decision this Court, with dubious regard for due course of law, relies upon unadmitted evidence and implements an unasserted affirmative defense to deprive the plaintiffs of the just compensation to which they were found entitled by both the trial court and the Court of Appeals. I share my colleagues' apparent regard for the magnitude of the award and its fiscal impact upon the state treasury. However, such award also reflects the magnitude of the aggregate loss resulting from the compelled labor extracted from the plaintiffs. Concern for the former cannot justify disregard of the latter.

APPENDIX B

ROBERT D. ORR, Governor of the State of Indiana;
DENNIS R. JONES, Mental Health Commissioner; et al.,
Appellants (Defendants Below)

v.

LEO J. SONNENBURG, GERALD HARNETT,
and DENNIS SHEFFIELD, on behalf of themselves
and all other similarly situated plaintiffs,
Appellees (Plaintiffs Below)

No. 37A03-8801-CV-4

Court of Appeals of Indiana, Third District
Appeal from the Jasper Circuit Court

August 7, 1989

Before HOFFMAN J., ROBERTSON, J., concurs; STATON, J., dissents with opinion.

HOFFMAN, J.:

Defendants-appellants Robert D. Orr, Governor of the State of Indiana; Dennis R. Jones, Mental Health Commissioner; et al. (hereinafter referred to as "State") appeal from a judgment in the sum of $27,954,852.68 entered on behalf of a class of 7,419 former patients of Indiana state mental institutions (hereinafter referred to as "Plaintiffs").

The facts relevant to this appeal disclose that the State had a long-standing practice of requiring patients committed to state mental institutions to perform manual labor, without compensation, for the institutions in which those patients were confined. The state institutions that carried out this manual labor policy were Muscatatuck State Hospital, Fort Wayne State Hospital and Training Facility, Central State Hospital, Richmond State Hospital, Norman Beatty Memorial Hospital, New Castle State Hospital, Logansport State Hospital, Larue D. Carter Memorial State Hospital, Evansville State Hospital and Madison State Hospital.

On May 23, 1974, Leo Sonnenburg and Gerald Harnett filed suit to secure compensation for labor performed while they were patients in institutions for the mentally handicapped operated by the State.

In addition to their individual claims, Sonnenburg and Harnett sought certification for a class action on behalf of all other persons similarly situated. The lower court certified the class of plaintiffs as follows:

> "'All patient workers who have labored in the State of Indiana Institutions for the Mentally Handicapped or Mentally Retarded from May 23, 1970 to December 31, 1974.'"

The case was tried to a special judge from April 20, 1987 through April 22, 1987, and from August 10, 1987 through August 12, 1987. A final judgment, in the form of a general judgment without findings of fact or conclusions of law, was entered on November 17, 1987. The special judge ruled (1) that the Plaintiffs had performed 8,735,891 hours of uncompensated work for the State during the class period; (2) that each member of the plaintiff class was entitled to compensation for his or her labor at $1.60 per hour for the hours worked in the state mental institutions, with an additional $1.60 per hour as prejudgment interest; (3) that the monetary award to the Plaintiffs totalled $27,954,852.68; and (4) that costs and attorney fees could be deducted from the fund established for the benefit of the plaintiff class.

The State challenges the judgment against it as contrary to law, arguing that no legal theory supports an award of compensation to the plaintiffs for work they performed while committed to state mental institutions. The Plaintiffs respond that the trial court's judgment may be supported by any one of six different theories of recovery: (1) the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; (2) the Civil Rights Act, 42 U.S.C. § 1983; (3) the 13th Amendment to the United States Constitution; (4) Article I, § 21 of the Indiana Constitution; (5) Indiana's Patient Remuneration Law, IND. CODE § 16-13-12.8-1 *et seq.* (repealed in 1985 and replaced by IND. CODE § 16-13-23-1 *et seq.* (1988 Ed.)); and (6) unjust enrichment. This Court will affirm the trial court's judgment if it is sustainable on any theory or basis found in the record. *Havert v. Caldwell* (1983), Ind., 452 N.E.2d 154, 157.

One of the theories of recovery upon which the Plaintiffs relied, and upon which the trial court's judgment may be sustained, is Article I, § 21 of the Indiana Constitution. That provision states in pertinent part, "No person's particular services shall be demanded without just compensation." The "particular services" language of

Article I, § 21 has rarely been addressed by Indiana courts. When the provision is considered, however, a distinction is drawn between particular services and general services.

General services are those services which an individual owes to the government and for which the individual can demand no compensation. Twomley, *The Indiana Bill of Rights*," 20 Ind. L.J. 211, 248 (1945). General services include service on grand and petit juries, service in the militia, service on the sheriff's *posse comitatus* and service as a witness in a criminal trial when one has knowledge of facts material to the vindication of the rights of others. *See Washington Nat. Bank v. Daily* (1906), 166 Ind. 631, 642, 77 N.E. 53, 56-57.

In contrast, particular services are those services which are not required from every citizen for the general good of the State. *See Knox County Council v. State ex rel. McCormick* (1940), 217 Ind. 493, 29 N.E.2d 405; *Webb v. Baird* (1854), 6 Ind. 13.

As a delegate to the Indiana Constitutional Convention of 1850 expressed:

> "I take it that the word particular . . . means, not that general service which every citizen is bound to render, but something specific -- something that is required of him as an individual, in counter-distinction to what is required, generally, of all citizens."

Debates of Indiana Convention of 1850, Volume 1, p. 359.

The Plaintiffs in the instant case were required to provide a range of services during their commitment to state mental institutions. Job categories included grounds helper, clothing room helper, canteen helper, store room helper, clerical assistant, technical helper, barber-beautician, housekeeper and laundry assistant. The Plaintiffs' jobs were in addition to the normal personal housekeeping and policing duties assigned to each patient. Such services must be characterized as particular services, as opposed to general services required of the citizenry at large.

The State does not maintain that the Plaintiffs' labors constituted general services for which they may not demand compensation. Instead, the State urges this Court to find that the Plaintiffs waived their claim of a constitutional violation, because the theory was not raised by the pleadings. This Court's review of the record discloses

that the Plaintiffs, during their opening statement, read Article I, § 21 of the Indiana Constitution to the court, and they indicated that the focus of their case would be the violation of constitutional rights. Thus the claim was raised prior to the introduction of evidence, was at all times before the trial court, and was an issue tried by the implied consent of the parties.

> Ind. Rules of Procedure, Trial Rule 15(B); *see also State Exchange Bank of Culver v. Teague* (1986), Ind.App., 495 N.E.2d 262.

As an alternative contention, the State suggests that the use of patient labor without compensation may not be considered a violation of Indiana's constitution, because the practice has existed for approximately 80 years. The State directs this Court's attention to the statutes establishing state mental institutions.

> *E.g.*, Ind. Code § 16-14-21-1 *et seq.* (repealed 1978) (establishing New Castle State Hospital);
> Ind. Code § 16-15-4-1 *et seq.* (repealed 1978) (establishing Muscatatuck Center).

Statutory references to state farms, industrial education, training and employment of institutionalized persons are construed by the State as a legislative endorsement of the prevalent practice of using patient labor without compensation. This Court is not persuaded that the long history of using uncompensated patient labor cloaks the practice with constitutionality. As the United States Supreme Court has observed:

> "Historical acceptance without more would not alone have sufficed, as 'no one acquires a vested or protected right in violation of the Constitution by long use.'" (Citations omitted.)
> *Committee for Public Education & Religious Liberty v. Nyquist* (1973), 413 U.S. 756, 792.

The State next asserts that reliance upon an uncompensated patient work force is nothing more than an exchange of labor for public relief. Within the context of poor relief assistance, there is a mandatory employment requirement. Ind. Code § 12-2-1-10(a) (1988 Ed.). The reasons for imposing a mandatory employment requirement are two-fold. First, the applicant is given a sense that he or she is earning, at least in part, the relief which is obtained.

In re Moore (1933), 97 Ind.App. 492, 493-494, 187 N.E. 219, 220. Secondly, the requirement operates as a reinforcement of the work ethic. Neither of these underlying policies applies to the circumstances surrounding an individual's commitment to a state mental institution. The State's attempt to draw an analogy between poor relief and the relief to be found in a state mental institution must be denied.

A final challenge to the Plaintiffs' recovery on constitutional grounds concerns the sufficiency of the evidence. According to the State, testimony from the Plaintiffs' witnesses was limited, fragmentary and confused. The State also suggests that the number of witnesses was inadequate, because only five of the ten mental institutions operated by the State were represented.

In reviewing the sufficiency of the evidence in a civil case, the court on appeal must decide whether there is substantial evidence of probative value supporting the trial court's judgment. The reviewing court will neither weigh the evidence nor assess the credibility of the witnesses, but it will consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn from the evidence. Only if there is a lack of evidence or evidence from which a reasonable inference can be drawn on an essential element of the Plaintiffs' claim will this Court reverse the trial court. *Martin v. Roberts* (1984), Ind., 454 N.E.2d 896, 904.

A study of the record in the instant case shows that 40 witnesses were called by the parties and 10,000 pages of documents were introduced into evidence. Among those documents were Answers to Interrogatories filed by the State which established that uncompensated patient labor was used in each of the ten state mental institutions. An economic study entered into evidence confirmed that uncompensated patient labor was used throughout the State of Indiana during the class period. // This Court concludes that the evidence was sufficient to support a judgment that the State violated Article I, § 21 of the Indiana Constitution.

Having determined that the Plaintiffs were entitled to recover damages under Article I, § 21 of the Indiana Constitution, this Court must address a number of ancillary issues raised by the State:

(1) whether the trial court erred in ordering the State to assist in a procedure for notification and verification of members of the plaintiff class ;

(2) whether the trial court erred in awarding prejudgment interest to the Plaintiffs;

(3) whether the trial court erred in awarding costs to the Plaintiffs; and

(4) whether the trial court erred in awarding attorney fees to Plaintiffs' counsel in the sum of $5,500,000.00

The State first alleges error in that portion of the trial court's judgment requiring the State to participate in a procedure for notifying and verifying members of the plaintiff class. The special judge ordered the Commissioner of the Indiana Department of Mental Health to provide notice of the judgment against the State to the superintendent of each state mental institution, the director of each community mental health center and each voluntary mental health association. In accordance with the final judgment, the Commissioner must request assistance from those entities in locating members of the plaintiff class who are not on the list of known plaintiffs.

The State contends that such a procedure for identifying members of the plaintiff class constitutes a "continuing trial" that could result in an increase in its liability with the discovery of each additional class member. It is the duty of this Court, if possible, to construe the judgment in such a way as to sustain its validity. *See Flynn v. Barker* (1983), Ind.App., 450 N.E.2d 1008, 1009. Accordingly, this Court holds that the lower court did not intend the damage award against the State to fluctuate whenever a new class member is located. Rather, the court intended for all members of the plaintiff class who may be identified with the State's assistance to have the benefit of the $27,954,852.68 judgment.

The second ancillary issue raised by the State concerns the award of prejudgment interest to the Plaintiffs. Exactly one-half of the $27,954,852.68 judgment against the State represented prejudgment interest.

It is a policy of law that the State is not liable for interest on payments due unless it binds itself by contract or statute to pay interest. *State of Indiana v. Scott Construction Company* (1931), 97 Ind.App. 652, 658, 174 N.E. 429, 431. This application of sovereign immunity derives from the principle that a State does not authorize its officers to incur obligations on its behalf unless by

contract or statute. *DPW v. Chair Lance Service, Inc.* (1988), Ind., 523 N.E.2d 1373, 1379.

The Plaintiffs do not dispute that the State generally enjoys immunity from prejudgment interest. However, they direct this Court's attention to a line of condemnation cases upholding an award of prejudgment interest against the State.

> *E.g.*, *State v. Young* (1964), 246 Ind. 52, 199 N.E.2d 694; *State v. Stabb* (1948), 226 Ind. 319, 79 N.E.2d 392 (overruled as to its definition of consequential damages in *State v. Heslar, Extrx.* (1971), 257 Ind. 307, 274 N.E.2d 261).

In such cases the reviewing courts have applied the second clause of Article I, § 21 of Indiana's constitution:

> "No person's property shall be taken by law, without just compensation; nor, except in the case of the State, without such compensation first assessed and tendered."

The courts have ruled that one of the elements of just compensation in eminent domain proceedings is the allowance of interest. *Stabb, supra*, 226 Ind. at 328, 79 N.E.2d at 396.

The Plaintiffs assume that just compensation for particular services necessarily includes interest, because courts have awarded interest to fairly compensate property owners whose land is taken in condemnation proceedings. This Court perceives an immediate distinction between just compensation for property and just compensation for particular services. A taking in eminent domain involves substantial interference with private property which impairs or destroys one's free use and enjoyment of the property or one's rights and interests in the property. *Schuh v. State* (1968), 251 Ind. 403, 407, 241 N.E.2d 362, 364. Such interests in property traditionally have been accorded special protection. *See* 63A Am.Jur.2d *Property* § 42 (1984). Yet in the instant case, involving payments due for services rendered, the policy of law that the State is not liable for interest must prevail.

The State's next appellate contention challenges that part of the trial court's judgment granting the Plaintiffs' reimbursement for their suit expenses. The State argues that it may not be required to pay the litigation expenses of the Plaintiffs, because such a requirement would be punitive in nature. That argument ignores an essential aspect of the trial court's judgment: costs were charged

against the common fund established for the benefit of the plaintiff class and were not assessed against the State.

Ind. Rules of Procedure, Trial Rule 23(D) provides, "The court shall allow reasonable attorney's fees and reasonable expenses incurred from a fund recovered for the benefit of a class under this section . . . ." By charging expenses against the common fund, a court exercises its equitable powers to insure that the beneficiaries of the litigation share the expense and to prevent the unjust enrichment of "free riders." *See St. Joseph's College et al. v. Morrison, Inc.* (1973), 158 Ind.App. 272, 280, 302 N.E.2d 865, 870. The lower court committed no error by charging costs against the common fund established for the Plaintiffs.

The final issue raised on appeal is whether the trial court erred when it awarded attorney fees in the amount of $5,500,000.00. According to the State, the award of attorney fees was contrary to law, because it was not calculated by multiplying a reasonable hourly rate by a reasonable number of hours expended.[1]

When awarding attorney fees, the trial court is empowered to exercise its sound discretion. *Arnold v. Dirrim* (1979), Ind.App., 398 N.E.2d 426, 441. A successful challenge to the award of attorney fees must demonstrate an abuse of discretion. *Id.*

The trial court in the instant cause considered the following factors in determining the amount of attorney fees to be awarded: the size of the recovery or common fund; the results achieved through the litigation; the time and labor required; the novelty and difficulty of the questions presented to the court; the requisite skill to perform the legal services properly; the preclusion of other employment by the attorney or attorneys due to the acceptance of this case; the customary fee or fee arrangement; the time limitations imposed by the client or the circumstances of the case; the experience, reputation and ability of the attorneys; the undesirability of the case; the nature and length of the professional relationship with the client; the awards in similar cases; and whether the fee was fixed or contingent. The consideration of such elements in determining the

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[1] The plaintiffs challenge the State's standing to question the award of attorney fees, as the award does not constitute an additional sum charged to the State but is to be deducted from the fund established for the benefit of the plaintiff class. This Court addresses the issue of attorney fees to provide guidance to the lower court on remand.

sum to be awarded as attorney fees was entirely appropriate. *See City of East Chicago v. Broomes* (1984), Ind.App., 468 N.E.2d 231, 235. Contrary to the State's position, the trial court's exercise of discretion in awarding attorney fees was not restricted by a mathematical formula of reasonable hourly rate multiplied by reasonable number of hours expended.

The trial court indicated in its judgment that its primary considerations in determining attorney fees were the size of the recovery and the results achieved through the litigation. As a consequence of this Court's ruling that prejudgment interest may not be assessed against the State, the size of the common fund has been reduced from $27,954,852.68 to $13,977,426.34. Accordingly, the trial court must re-calculate the award of attorney fees in light of the decrease in the common fund.

STATON, J., dissenting:

I dissent from the Majority's denial of prejudgment interest. Without the award of prejudgment interest Sonnenburg and the other mental patients will never be made whole or completely compensated for the forced labor demanded from them by the State. The Majority has tortured Article I, Section 21 of the Indiana Constitution to arrive at the result of no prejudgment interest. The Majority is mistaken in its interpretation of the Indiana Constitution. The facts of the case before this Court have nothing to do with "payments due for services rendered." The facts concern the concept of "particular services taken," and the constitutional concept of "just compensation." The award of prejudgment interest by the trial court is supported by Indiana law and federal law. I would affirm the entire judgment of the trial court.

The Majority maintains that sovereign immunity precludes an award of prejudgment interest against the State. However, eminent domain proceedings are conceded by the Majority as an exception to the sovereign immunity preclusion. While leaning on sovereign immunity, the Majority concludes that "just compensation" for "particular services taken" does not include prejudgment interest. This conclusion falls by its own irrationality.

The award of prejudgment interest in eminent domain proceedings stems from the concept of "just compensation" as included in the second clause of Article I § 21 of the Indiana Constitution.

> No person's property shall be taken by law, without just compensation; . . .

Ind. Const. Art. I § 21. However, the Majority conveniently chooses to ignore the first clause of that section, which is identical to the second:

> *No person's particular services shall be demanded, without just compensation.* No person's property shall be taken by law, without just compensation; . . .

Id.

Yet, despite the identical use of the phrase "just compensation" in the same section, the Majority audaciously states:

> This Court perceives an immediate distinction between just compensation for property and just compensation for particular services.

This conclusion completely ignores the rules of statutory construction in Indiana.

As early as 1934, our Supreme Court stated, "the same rules of construction should be applied to constitutional provisions as to statutory provisions . . ." *In re Todd* (1935), 208 Ind. 168, 190, 193 N.E. 865, 873.

Accordingly, the following rule of statutory construction is applicable here. In the words of Judge Hoffman, "[t]erms contained in a statute will be *construed consistently* . . . ." (Emphasis added.) *Wilson v. Brown* (1984), Ind.App., 461 N.E.2d 1162, 1164, *reh. granted* 464 N.E.2d 1332, *trans. denied.*

Consequently, the phrase "just compensation" must be construed consistently within Article I § 21 of the Indiana Constitution. Indiana recognizes an exception to the concept of sovereign immunity in eminent domain proceedings, and allows the recovery of prejudgment interest. The same rationale applies when "particular services" are taken.

In addition to proper statutory construction, state and federal case law also support the award of prejudgment interest; to support its

claim that "the State is not liable for interest on payments due unless it binds itself by contract or statute to pay interest," the Majority relies on two cases: *State v. Scott Construction Co.* (1931), 97 Ind.App. 652, 174 N.E. 429, and *Indiana Dep't of Public Welfare v. Chair Lance Service, Inc.* (1988), Ind., 523 N.E.2d 1373. However, when reading these cases in their entirety, along with the seminal case from which these cases stem, i.e., *United States v. State of North Carolina* (1890), 136 U.S. 211, 10 S.Ct. 920, as well as the meager line of cases which culminate in *Chair Lance*, it is readily apparent that these cases all involved *agreements* whereby dollars would be paid. Consequently, these cases have no bearing on the case before us.

In *Scott*, the State contracted with the Scott Co. for the construction of a highway. The question before the court was whether interest could be added to *the money due under the contract*. Contrary to the Majority's interpretation, *Scott* actually stated:

> *where the state promises to pay a sum of money* but does not promise to pay interest . . ., the right to recover is strictly limited by the terms of *the contract*." (Emphasis added.)

Scott, supra, 174 N.E. at 431. Thus, *Scott* actually determined whether pay due under a contract could go beyond the terms of the contract.

Similarly, *Chair Lance* also involved a dispute over the amount of money due *pursuant to an agreement*. Here, the Indiana Department of Public Welfare was to reimburse Chair Lance for the transportation of wheelchair patients; when the money was withheld, Chair Lance sought prejudgment interest to compensate for the loss of the use of the money. However, in denying prejudgment interest, our Supreme Court noted that Ind. Code 4-22-1-18(c), the statute upon which the trial court ruled, only authorized the court to "compel agency action." Thus, our Supreme Court concluded that "[t]his statute, . . ., does not authorize the court to compel a state agency to pay interest on money unlawfully withheld." *Chair Lance, supra*, at 1379.

Our Supreme Court then noted that the State was "not liable for interest *on payments due* unless it binds itself by contract or statute to pay interest." *Id.* However, here again, the State *had agreed* to pay a certain amount of money to another party via a contract; the question was whether interest could be awarded absent such a

provision in that contract.

The above cases have their origin in *North Carolina*, *supra*. In this case, the question was "whether, as a matter of law, the principal of the bonds bore interest after maturity . . . ." *North Carolina*, *supra*, at 922. Therefore, while the Court may have concluded that interest is not to be awarded against the State absent a contract or statute, crucial to that pronouncement is the fact that the case involved money due via a contract to pay on *bonds*.

Contrary to the Majority's basic premise, this case is not contractual in nature: it does not involve "payments due for services rendered." The State and patients of the Mental Institutions did not make a private agreement whereby the State would reimburse them for their forced labor.

Instead, the rights of the mental patients were infringed upon when their "particular services were demanded" without "just compensation," contrary to the Indiana Constitution. Accordingly, the line of cases beginning with *North Carolina*, including *Scott*, and culminating in *Chair Lance*, have no bearing upon the case before us.

Furthermore, the Majority states that "one's free use and enjoyment of the property or one's rights and interests in the property . . . traditionally have been accorded special protection," referring to 63A Am.Jur.2d *Property* § 42 (1984). Yet, upon reading § 42, it is apparent that this section singles out the "right of property" as being important only insofar as it is *one* of the fundamental rights. Section 42 does not refer to any "special protection" afforded to property rights over and above other, personal, rights. The Constitutional right to be justly compensated for the taking of "particular services" by the State has equal protection.

Unlike the United States Constitution, which protects one from being "deprived of life, liberty, or property, without due process of law," and prohibits "private property [from] be[ing] taken for public use, without just compensation," U.S. Const., 5th Amend., the Indiana Constitution adds an additional protection. Our State Constitution protects one's liberty by specifically prohibiting the demanding of one's "particular services" without "just compensation." Consequently, while federal case law discusses the protection of liberty, it necessarily does so without being bound to protect its "taking" by "justly compensating" the party whose

"particular services" were taken.

Nonetheless, even without specific authority protecting the taking of "particular services" with "just compensation," federal case law has recently noted that special protection is necessary to "fully compensate" one for the loss suffered in these instances.

On more than one occasion, the United States Supreme Court determined that interest should be allowed to fully compensate injured parties. In *Waite v. United States* (1931), 282 U.S. 508, 51 S.Ct. 227, the Court ruled upon what constituted "entire" compensation to a party whose patented invention had been used by the government without authorization. The Court stated: "[t]he statute grants 'recovery of his reasonable and entire compensation for such use.' We are of opinion that interest should be allowed in order to make the compensation 'entire.'" *Waite, supra*, at 227. *See also, General Motors Corp. v. Devex Corp.* (1983), 461 U.S. 648, 657, 103 S.Ct. 2058, 2063.

More recently, the Court reiterated its conviction that full compensation can require prejudgment interest. In *West Virginia v. United States* (1987), 479 U.S. 305, 107 S.Ct. 702, the Supreme Court determined that West Virginia was not immune from paying prejudgment interest to the federal government as the "States have no sovereign immunity as against the Federal Government." *West Virginia, supra*, at 707. The Court stated that "[p]rejudgment interest is an element of complete compensation," and, in a footnote, explained its reasoning as follows:

> [p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress. (Further reference omitted.)

West Virginia, supra, at 706, and n.2. Surely, compensation cannot be "just" if it is not "entire" as well as "complete."

The Seventh Circuit recently advanced reasons for awarding prejudgment interest with an award of back pay. In *Hunter v. Allis-Chalmers Corp., Engine Div.* (7th Cir. 1986), 797 F.2d 1417, the court noted that there is "time value" attached to money, stating that "full compensation requires recognition of the time value of money." *Hunter, supra*, at 1426.

Later, in *Williamson v. Handy Button Mach. Co.* (7th Cir. 1987), 817 F.2d 1290, a § 1981 suit was before the court. The Seventh Circuit allowed the award of prejudgment interest, and supported its decision with the following reasons.

> [P]rejudgment interest is necessary to make the award fully compensatory. . . . The award should make the victim whole. . . . We have held that prejudgment interest is part of full compensation under other statutes, necessary to carry out the federal policies of compensation and deterrence. . . . Money today is simply not a full substitute for the same sum that should have been paid some time ago. Prejudgment interest therefore must be an ordinary part of any award of back pay (or other incurred expense) under § 1981.

Williamson, supra, at 1297.

Although the amount of back pay owed was ascertainable in that case, the Court nonetheless disposed of the "uncertainty" argument.

> The award of back pay under Title VII is an "equitable" rather than a "legal" remedy, however, and the common law requirement of certainty has never been applied to it. . . . *No purpose would be served by allowing the wrongdoer to keep the entire time value of the money*, just because the exact amount is subject to fair dispute. Once we know that back pay is at least some minimum, it is safe to award interest on that amount. (Emphasis added.)

Williamson, supra, at 1299.

When Sonnenburg and the other mental patients in his class were certified by the trial court, the court stated:

> "All patient workers who have labored in the State of Indiana Institutions for the Mentally Handicapped or Mentally Retarded from May 23, 1970 to December 31, 1974."

R. p. 86, 11. 26-28. For almost fifteen years, the patients have been waiting to be paid their $1.60 per hour. To deny them prejudgment interest, would be to deny them a complete monetary recovery for their labor. To deny them prejudgment interest would be to deny them their constitutional right to "just compensation."

I would affirm the entire judgment of the trial court.

APPENDIX C

LEO J. SONNENBURG, GERALD HARNETT,
and DENNIS SHEFFIELD, on behalf of themselves
and all other similarly situated plaintiffs,
Plaintiffs,

v.

ROBERT D.ORR, Governor of the State of Indiana,
DENNIS R. JONES, Mental Health Commissioner,
Defendants.

No. C-44-81

Jasper Circuit Court

November 17, 1987

FINAL JUDGMENT

The Court now renders Final Judgment in this matter, having heard and examined the witnesses called by the parties during the trial and the special hearing on attorney fees and suit expenses, having studied the Exhibits introduced by the parties, having the benefit of Argument, having read the Briefs submitted by the parties, as well as the Court's independent legal research, and being duly advised in the premises, the Court finds, as it did in the partial judgment of September 30, 1987, that this is a Class Action brought pursuant to Trial Rule 23 of the Indiana Rules of civil Procedure and was duly certified as a Class Action pursuant to Trial Rule 23 (B)(3) by the Honorable Michael S. Kanne who determined the class as follows:

> "All patient workers who have labored in the State of Indiana Institutions for the mentally handicapped or mentally retarded from May 23, 1970 to December 31, 1974."

The Court finds that this is an appropriate class in that the class seeks recovery for monies earned while performing work and labor at Muscatatuck State Hospital, Ft. Wayne State Hospital and Training Facility, Central State Hospital, Richmond State Hospital,

Norman Beatty Memorial Hospital, New Castle State Hospital, Logansport State Hospital, Larue D. Carter Memorial Hospital, Evansville State Hospital, and Madison State Hospital from May 23, 1970 to December 31, 1974, inclusive. The plaintiffs seek recovery on six separate and distinct theories: (A) 29 U.S.C. Sec. 201 et seq. (Fair Labor Standards Act); (B) Acts 1971, Ch. 487; Acts 1971, Ch. 474; Acts 1972, P.L. 3, Acts 1975, P.L. 151, [Patient Remuneration Law]; (C) Indiana Constitution; Article I, Section 21 [Right to Compensation for Services]; (D) Unjust Enrichment; (E) United States Constitution Amendment 13 [Involuntary Servitude]; (F) 42 U.S.C. Section 1983 [Deprivation of Civil rights under Color of State Law].

In accordance with its obligations under Trial Rule 23(C)(3), the Court further finds that Notice required under Trial Rule 23(B)(2) in the forms previously approved by this court was directed to the members of the class who could be identified, by first class, United States mail with postage prepaid, and in addition by publication in newspapers of general circulation in Marion, Lake, St. Joseph, Vanderburgh, Vigo and Allen Counties. The Court further finds that the class members and those persons to whom notice was directed, and who have not requested exclusion are listed in Exhibit A to the Partial Judgment of September 30, 1987, the same being a list of persons drawn from plaintiffs' Exhibits 35 through 44 and from plaintiffs' individual proofs of claim. The persons to whom notice was directed who have requested exclusion are listed in Exhibit B to the Partial Judgment of September 30, 1987. The court further finds that there may be persons who are members of the plaintiff class whose names are not found in Exhibit A to the Partial Judgment of September 30, 1987, and are unknown to the parties, due to the incompleteness or inaccuracy of the records maintained by the State. An individual claim will need to be filed by such class members as set out in this judgment below, [PART II Paragraph E].

The Court further finds that neither party has filed requests for findings of fact and conclusions of law by the Court pursuant to Trial Rule 52(a) of the Indiana Rules of Procedure, and therefore the Court now finds that the facts and the law are with the plaintiffs and against the defendants.

PART I

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff class have and recover from the defendants the sum of Twenty Seven Million, Nine Hundred Fifty Four Thousand, Eight Hundred Fifty Two Dollars and Sixty-Eight Cents ($27,954,852.68) which sum was calculated as followed:

A. The hours of each individual plaintiff class member who performed work or services for the State of Indiana in its institutions for the mentally handicapped from May 23, 1970 to December 31, 1974 was determined and is found in Exhibit C to the partial judgment of October 27, 1987, said hours having been calculated in the following manner:

(1) Where the actual hours of work for a plaintiff was determined, and introduced into evidence in Exhibits 35 through 44 inclusive under Status Codes A, I, U, D, Y and M, less any hours worked prior to May 23, 1970 and after December 31, 1974 was used as the hours of work for that individual plaintiff;

(2) Where the actual hours worked by any plaintiff could not be determined because of lack of specificity and/or information and shown in Exhibits 35 through 44 inclusive under Status Codes X, Z, H, E, S, and J the average hours for their respective hospital was used as shown in Exhibit 137 for the hours of work for that individual plaintiff;

B. That in accordance with the partial judgment of September 30, 1987, the hours determined in accordance with Paragraph A, above, was then multiplied by a reasonable wage of one dollars and sixty cents ($1.60) for each hour to determine a total age earned by that individual plaintiff, and is found in Exhibit C to the partial judgment of October 27, 1987.

C. That in accordance with the partial judgment of September 30, 1987, pre-judgment interest at the rate of 8% per annum commencing on the 1st day of January, 1975 to the date of Judgment, not to exceed double the amount of wages due was calculated and is found in Exhibit C to the partial judgment of October 27, 1987.

PART II

In order to assure that all members of the plaintiff class have the benefit of this judgment, IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

A. Within 120 days from the date of this Final Judgment, the Commissioner of Mental Health for the State of Indiana shall notify the Superintendent of each State Facility for the residential care of the mentally ill or mentally retarded, forwarding to such Superintendent a copy of this Final Judgment including the list of known plaintiffs. The Superintendent of each hospital shall determine if any of the hospital's current patient residents were residents at any time from 5/23/70 to 12/31/74, and if so, the Superintendent is to determine if that patient resident could have worked during the aforesaid period. The Superintendent, within 30 days after receipt of this Final Judgment, shall notify Terrance L. Smith, attorney for the plaintiffs of any patient resident who worked or could have worked as above described and who is not on the list of plaintiffs forwarded to him by the Commissioner of Mental Health.

B. Within 120 days of the date of this Final Judgment, the Commissioner of mental Health for the State of Indiana shall notify the Director of each licensed Community Mental Health Center, located in the State of Indiana, forwarding to such Director a copy of this judgment including the list of known plaintiffs. The Director of each Community Mental Health Center shall be requested to determine if any of their current patients performed labor or services in the State of Indiana Institutions for the mentally ill or mentally retarded from 5/23/70 to 12/31/74 and are not on the list of plaintiffs forwarded to him by the Commissioner of Mental Health. If the Director of the Community Mental Health Center determines that any patient meets the above criteria, then he is requested to obtain consent from said patient and notify Terrance L. Smith, attorney for the plaintiffs, of the patient's name, current address, and hospital at which he was a resident during the aforementioned period.

C. Within 129 days from the date of this Final Judgment, the Commissioner of Mental Health for the State of Indiana shall notify each voluntary Mental Health Association operating in the State of Indiana, forwarding to such association a copy of this judgment

including the list of known plaintiffs. The Commissioner shall request the assistance of Associations of Mental Health in locating any members of the plaintiff class who performed work or labor in the State of Indiana Institutions for the mentally ill or mentally handicapped from 5/23/70 to 12/31/74 and who are not on the list of plaintiffs forwarded to them by the Commissioner of Mental Health. The Associations of Mental Health, upon consent of the class members, are requested to notify Terrance L. Smith, attorney for the plaintiffs of any such class member including their current address and hospital in which such member was a patient.

D. With 120 days from the date of this Final Judgment, the Commissioner of Mental Health for the State of Indiana shall give notice by way of publication in a newspaper authorized by law to publish Legal Notices in the following localities: (1) In each city or municipality of the State of Indiana having a population in excess of 25,000 people, and (2) In each country of the State of Indiana where no city or municipality exceeds 25,000 people. The Notice shall be published three times, the first publication shall be made within 120 days from the date of this order, and each two succeeding publications at least 7 but not more than 14 days after the prior publication. The attorneys for the defendants shall prepare a return, which should include the following: (1) Any supporting Affidavits of the printer containing a copy of the Notice which was published; (2) Any information or statement that the newspaper and the publication meet all legal requirements applicable to such publication; (3) The dates of publication. The return and Affidavits shall be filed with the pleadings and other papers in this case and shall become a part of the record as provided in the Indiana Rule of Trial Procedure. The Notice to be published shall be as follows:

JASPER CIRCUIT COURT

LEO J. SONNENBURG, et al.)
v.)
ROBERT ORR, Governor of)
the State of Indiana, et al.)

NOTICE OF JUDGMENT

To: ALL PATIENT-WORKERS WHO PERFORMED LABOR OR SERVICES IN THE STATE OF INDIANA INSTITUTIONS FOR THE MENTALLY ILL OR MENTALLY HANDICAPPED FROM MAY 23, 1970 TO DECEMBER 31, 1974.

You are hereby advised that a judgment has been entered on your behalf and against the defendant for wages and prejudgment interest earned by you during the period of May 23, 1970 to December 31, 1974.

If you believe you performed labor or services in the State of Indiana Institutions for the mentally ill or mentally handicapped at any time between May 23, 1970 and December 31, 1974, send your name, current address and the hospital in which you worked to:

Terrance L. Smith
Smith & DeBonis
4320 Fir Street, Suite 411
East Chicago, Indiana 46312

ss/ William W. Andersen, Jr.
Special Judge
Jasper Circuit Court

E. The attorneys for the plaintiff, after they have received the lists compiled by the Superintendent of each mental hospital for the residential care of the mentally ill or mentally retarded as required in Part II, Paragraph A, shall submit an individual claim on behalf of each individual listed by the Superintendent for inclusion as a

class member under this judgment. Additionally, the attorneys for the plaintiff shall submit an individual claim for each individual who claims to be a member of the plaintiff class and whose name does not appear on the list of plaintiffs attached to the Final Judgment. The Court shall set hearings from time to time as needed to determine the eligibility of such claimant for inclusion as a class member in the judgment.

PART III

Trial Rule 23(D) of the Indiana Rules of Procedure provides that this "court shall allow reasonable attorney fees and reasonable expenses incurred from the fund recovered for the benefit of the class." Evidence was presented on the issues of attorney fees and suit expenses at a special hearing wherein an attorney for the plaintiff class testified as well as a class representative and attorneys Theodore Lockyear, Saul Ruman, Glenn Tabor and Richard Andrew Young.

In Indiana, the amount of attorney fees to be awarded is a matter of discretion. In determining a reasonable award, the amount involved, and the results achieved through the litigation are generally the primary considerations. Other factors include (1) the time and labor required; (2) the novelty and difficulty of the questions presented to the court; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney or attorneys due to the acceptance of this case; (5) the customary fee or fee arrangement; (6) the time limitations imposed by the client or the circumstances of the case; (7) the experience, reputation and ability of the attorneys; (8) the "undesirability" of the case; (9) the nature and length of the professional relationship with the client; (10) the awards in similar cases; and (11) whether the fee is fixed or contingent. Each of these elements the court has considered in making the award as hereafter set out.

The court finds plaintiffs' counsel entered into contingent fee contracts with the court-certified representatives of the plaintiff class, one contract signed in 1974 and the other in 1991. Members of the class were given individual notice of the contingent fee contract and given an opportunity to object to the contingent fee arrangement. No member of the class offered objection to the contingent fee arrangement.

In reviewing the record, the court finds that this action was filed almost 14 years ago and has been vigorously litigated throughout that period of time. At the outset, plaintiffs took discovery and obtained a Summary Judgment on the issue of liability which later became moot due to a United States Supreme Court ruling. After Further discovery, the plaintiffs again sought a obtained Summary Judgment on the issue of liability which was appealed by the defendants and reversed by the Indiana Court of Appeals for procedural errors in the class certification process. The case was remanded to this court for further proceedings. Following remand, the State sought dismissal and moved for Summary Judgments on two separate occasions requiring extended research and briefs. The Motion to Dismiss, and the Motions for Summary Judgment were denied. Trial was necessary on the merits resulting in a substantial sum being awarded to the plaintiff class. In addition to the fund created for the benefit of the class, a Fifty-five million dollar ($55,000,000.00) cross-claim was dismissed against the class in great part as a result of action taken by plaintiffs' counsel.

The Court finds that without the innovation, skill and perseverance of plaintiffs' counsel, the class of mental patients would have received nothing for the millions of hours of labor they spent working for the State mental institutions. Plaintiff counsel's determination and perseverance avoided an unjust result.

In addition to attorney fees, plaintiffs' attorneys have requested that their award include costs which total almost Eight Five Thousand Dollars ($85,000.00) and which have been incurred by the plaintiffs' attorneys in the prosecution of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from the fund established for the benefit of the plaintiff class as ordered in Part I of this Final Judgment the sum of Eight Two Thousand Two Hundred Thirty Four Dollars and Sixty Nine Cents ($82,234.69) is awarded to the law firm of Smith & DeBonis, of East Chicago, Indiana, and the sum of One Thousand One Hundred Fifty Nine Dollars and Fifty One Cents ($1,159.51) is awarded to the law firm of Smith & Smith of LaPorte, Indiana as expenses of suit incurred in the representation of this matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sum of Two Million Five Hundred Thousand ($2,500,000.00) Dollars shall be reserved and set aside from the

fund created in Part I of this Final Judgment to be used to pay attorney fees for services performed following the entry of this Final Judgment. If this reserve fund proves to be more than sufficient, any monies not used shall be distributed to the plaintiff class. However, if this reserve fund proves to be insufficient for the purpose of administering this Final Judgment, the attorneys for the class may petition this court to set aside further reserve funds. For all attorney services performed for the benefit of the plaintiff class after the entry of this Final Judgment, including appeals, the attorney shall be paid at the rate of Two Hundred-Fifty Dollars ($250.00) per hour. Prior to payment of attorney fees for services performed after entry of this Final Judgment, the attorneys shall submit their claim to this court for approval.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that expenses, direct or incidental, incurred by plaintiffs' attorneys after the entry of this Final Judgment which are necessary for the purpose of carrying out this Final Judgment, including appeals, shall be paid to said attorney from the fund created in Part I of this Final Judgment. Prior to payment of such expenses, the attorneys shall submit their claim for payment to this court for approval.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the attorney fees and suit expenses be borne by the members of the plaintiff class found in Exhibit C to the Partial Judgment of October 27, 1987, pro rata upon the amount that each member would receive by reason of the Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff class recover the cost of this action against the defendants. The moneys paid by the defendants as cost shall be added to the fund established for the benefit of the plaintiff class as ordered in Part I of this Final Judgment.

All of which is CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court this 17th Day of November, 1987.

/s/_____
William W. Andersen, Jr.
Special Judge
Jasper Circuit Court

APPENDIX D

OTIS BOWEN, M.D., GOVERNOR OF THE STATE OF INDIANA; WILLIAM E. MURRAY, M.D., MENTAL HEALTH COMMISSIONER; PATIENT REMUNERATION BOARD, STATE OF INDIANA, Defendants-Appellants

v.

LEO J. SONNENBURG, a/k/a/ LEO J. SONBURG, by his sister and Legal Guardian, Marie Maupin; GERALD HARTNETT; ON BEHALF OF THEMSELVES AND ALL SIMILARLY SITUATED PLAINTIFFS, Plaintiffs-Appellees

No. 3-1078A 267

Court of Appeals of Indiana, Third District

October 9, 1980

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Bruce W. Douglas, Judge; 74-PSC-1949

Before: GARRARD, P.J. HOFFMAN, J. & STATON, J.

GARRARD, P.J.

This action was brought by Leo J. Sonnenburg and Gerald Hartnett to secure compensation for services performed while they were patients in institutions for the mentally handicapped and mentally retarded in the State of Indiana. In addition to individual claims they sought to conduct a class action for the benefit of all other persons similarly situated.

I. History of the Case

A simplified account of the progress of the suit is as follows. The original complaint was filed May 23, 1974. It contended that the plaintiffs were entitled to be paid for all services performed in accord with the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. [1]

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[1] *See Souder v. Brennan* (D.C.D.C.1973), 367 F. Supp. 808. Subsequently, the provisions of that act making it applicable to employees of a state were declared an unconstitutional infringement upon the powers reserved to the states. *National League of Cities v. Usery* (1976), 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245.

In March 1976, the complaint was amended to refer to the Indiana Patient Remuneration Act, IC 16-13-12.8-1 with the contention that the act was unconstitutional as a violation of the supremacy clause.

The complaint was again amended, apparently in August 1977 (although the file stamped copy contained in the transcript bears the date September 22, 1978). This complaint asserted that patient-employees were entitled to compensation under the Indiana act after January 21, 1972; that the Fifty Thousand Dollar ($50,000) appropriation contained in the act denied them equal protection of the laws and imposed upon them involuntary servitude in violation of the federal constitution; and that "[the] named class of plaintiffs is incapable, by reason of mental handicaps and because they are, while mental patients in the physical custody of the defendants, unable to bring administrative action before the Patient Remuneration Board as established by the statute to recover claims for wages past due." It is unclear whether plaintiffs were attempting to state a claim for the period prior to January 21, 1972.

The defendants answered in denial and raised as affirmative defenses failure to state a claim, lack of jurisdiction of the subject matter, lack of standing of plaintiffs, statute of limitations and the failure of plaintiffs to exhaust their administrative remedies.

In November the plaintiffs filed a motion for partial summary judgment in which they sought judgment that this was a proper class action; that the defendants were obligated to pay the minimum wage under the Fair Labor Standards Act to mentally ill or retarded employees in hospitals, institutions and schools operated by the Department of Mental Health and had failed to do so; and a declaratory judgment that the plaintiffs had performed valuable services for the defendants.

The defendants' response, among other things, questioned the propriety of a class action. In addition they moved for a partial summary judgment to the effect that the Patient's Remuneration Act provided an administrative remedy that must be utilized before a civil action could be maintained.

On January 11, 1978 Alban L. Smith petitioned to intervene asserting that he was "the duly appointed guardian ad litem of all the patient workers who are confined to the Beatty Memorial Hospital, Westville, Indiana, and has been such guardian ad litem since the 23rd day of June, 1976," and as such was interested in the

litigation.

Upon this state of the record, and considering the affidavits on file as well as the defendants' responses to discovery, on February 16, 1978 the court entered two orders. First, it found that Alban L. Smith was guardian ad litem for all patient-workers at Beatty Memorial Hospital and as such should be allowed to intervene as a plaintiff. Secondly, it considered the motions for partial summary judgment, and determined that the plaintiffs' motion should be granted and the defendants' denied. It then entered an order specifying that:

(a) the action was properly maintainable as a class action;

(b) a proper class consisted of "all patient workers who have labored in the State of Indiana institutions for the mentally handicapped or mentally retarded since the enactment of the Patient Remuneration Law (L.C.[*sic*]16-13-12.8-1, *et seq.*);"

(c) the plaintiffs establish guardians ad litem in each of the counties where the ten state institutions enumerated by the court exist and such guardians be given the appropriate class action notice;

(d) the defendants notify by first class mail each member of the class not (no longer) confined in one of the institutions; and

(e) "the members of the class are entitled to be paid for all their labor performed for the defendants, at least to the gross amounts specified in the Patient Remuneration Law, after April 1, 1972;"

From these orders an interlocutory appeal was perfected by the defendants. However, before addressing the issues raised, it is necessary that we depart briefly to consider the statute in question since its scheme and applicability bear directly upon the matters in issue.

II. Patient Remuneration Act

Because of amendments to the Indiana Patient Remuneration Act, IC 16-13-12.8-1 et seq. during the period contemplated in the lawsuit, we consider the act as it evolved.

The bill was originally enacted by the 1969 legislature, vetoed and enacted over the veto on January 22, 1971. Acts 1969, Ch. 487. This act established a seven member patient remuneration board and concerned patients in any mental institution or institution

for the mentally retarded operated by the State Department of Mental Health. Essentially it required the board to establish a schedule of occupational classifications and a remuneration schedule for them within six months after the effective date of the act. It provided the schedule should become effective "subject to the availability of funds" within seven months after the effective date and would provide remuneration for patients performing "work activity" as defined in the act. Section 9 provided a right of administrative review through the patient remuneration board and subsequent appeal to the courts for any patient who believed he had not been properly remunerated. No effective date was specified in the act, nor was a specific appropriation made.

The 1971 legislature also amended the act. Acts 1971, P.L. 474. These amendments restructured the board and increased its size to nine members; redefined "work activity" for which compensation was contemplated; and provided that the patient remuneration schedule should be completed within six months after the effective date of the act and would take effect "within thirty (30) days after having been reviewed and approved by the State Budget Agency" as to the availability of funds to implement its provisions. Again no effective date was specified, but an appropriation of fifty thousand dollars annually was made with the expression that "[t]he maximum annual expenditure may not exceed this specific appropriation." Acts 1971, P.L. 474, § 9. Additionally this version provided patients would be entitled to remuneration "if funds are available at the rate set forth in the remuneration schedule" for work activity "on and after the date the Department of Mental Health patient remuneration schedule shall first become effective."[2] The right of administrative review by the board was retained but reference to civil actions was deleted.

Acts of 1972, P.L. 3, approved January 21, 1972 and containing an emergency clause repealed Chapter 487 of the Acts of 1969, as amended, and re-enacted the 1971 act as Ch. 12.8 of IC 1971, 16-13, retaining its effective dates.

Amendment again occurred in 1975. Acts 1975, P.L. 151. The legislature then redefined the significant service in terms of

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[2] These statutes became effective on promulgation September 2, 1971. The schedules should therefore have been prepared by March 2, 1972.

"employment relationship" rather than "work activity." This version required the board to prepare a pay plan for patient remuneration but deleted reference to its completion date and to review and approval by the State Budget Agency. It provided the remuneration schedule should be the federal minimum wage, except that the board could "grant higher or lower wages in accordance with the skills of the patient." Also deleted was the proviso "if funds are available" concerning when the schedule was to become effective. These amendments became effective upon promulgation on July 29, 1975.

Finally, Acts of 1978, P.L. 21 abolished the Patient Remuneration Board and its functions effective December 31, 1978. Also repealed were the provisions for administrative review and the appropriation of fifty thousand dollars per year.

These institutions referred to were found by the trial court to include the following: Central State Hospital, Indianapolis; Evansville State Hospital, Evansville; Madison State Hospital, Madison; Logansport State Hospital, Logansport; Richmond State Hospital, Richmond; Muscatatuck State Hospital, Butlerville; Norman Beatty Memorial Hospital, Westville; Larue Carter Memorial Hospital, Indianapolis; New Castle State Hospital, New Castle; and Fort Wayne State Hospital and Training Center, Fort Wayne.

From the foregoing it is readily apparent that the action before us involves substantive issues of great weight concerning the rights of mentally handicapped persons in state institutions and the public treasury. Those issues are complicated by a difficult statutory history, imprecision in the nature of the claims advanced,[3] and the complexity of class action.

We find the court erred both in its handling of the class action determination and the substantive issues decided on summary judgment. Since we find it necessary to reverse and remand, we also discuss those class action matters likely to arise again regardless of whether they were properly put in issue in this appeal in an effort to expedite the course of this litigation. For the sake of clarity we will treat them in the context in which they occur.

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[3] While plaintiffs' second amended complaint voices a claim under the statute, it arguably encompasses claims under both the state and federal constitutions well.

III. Guardian ad litem

In its first order of February 16 the court found that Alban L. Smith was the duly appointed guardian ad litem of all patient-workers at Norman Beatty Memorial Hospital and *as such* should be permitted to intervene as a party plaintiff in the action.

A guardian ad litem is someone appointed by the court in which a particular litigation is pending to represent a ward or an unborn person *in that particular litigation.* IC 29-1-18-1; *State ex rel Keating v. Bingham* (1954), 233 Ind. 504, 121 N.E.2d 727. Such appointments are authorized by IC 34-2-3-1 for protecting the interests of a minor and are explicitly recognized by IC 29-1-18-1 for the protection of one who is incapable by reason of insanity, mental illness or mental retardation of either managing his property, caring for himself, or both.

By its very definition, and in contrast to the statutes dealing with general guardianships of the person and estate, IC 29-1-18-1 et seq., the only status of a guardian ad litem exists in the particular litigation in which the appointment occurs. It therefore clearly follows that whether Alban L. Smith had, on one occasion or many, served capably as guardian ad litem for one or more patients at Norman Beatty Memorial Hospital, created in him no status or standing to intervene in this litigation. Thus, the court committed error when it permitted his intervention on those grounds. Moreover, since the rules require that for a class action only "one or more members of a class" may sue or be sued as representative parties; and since Mr. Smith is clearly not a member of the proposed class of patient-workers, he was otherwise ineligible to participate as a party plaintiff in the cause. TR 23(A).

IV. Class Actions

Indiana Rules of Procedure, Trial Rule 23[4] is the general rule[5]

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[4] "(A) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable

(2) there are questions of law or fact common to the class

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defence of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

(C) Determination by order whether class action to be maintained -- Notice -- Judgment -- Actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court, upon hearing or waiver of hearing, shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the

merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(a) the court will exclude him from the class if he so requests by a specified date;

(b) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate

(a) An action may be brought or maintained as a class action with respect to particular issues, or

(b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(D) Orders in conduct of actions. In the conduct of actions to which this rule applies, the court may make appropriate orders

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time. The court shall allow reasonable attorney's fees and reasonable expenses incurred from a fund recovered

governing class actions. With two exceptions[6] it follows the federal rule, F.R.C.P. 23, verbatim. In addition, our civil code study commission comments direct the bar, with approval, to the note of the Advisory Committee to the Federal rule. *See* 2 W. Harvey, Indiana Practice, Rules of Procedure Annotated 329.

For these reasons, and because this is an area of complex litigation where the bench and bar are greatly benefitted by a broad body of interpretative law, we will, as far as possible, adopt the federal interpretation of the language of the rule.[7] *See Gumz v. Starke Co. Farm Bur. Co-op Ass'n.* (1979), ___ Ind. ___, 395 N.E.2D 257; *Rembold Motors, Inc. v. Bonfield* (1973), 155 Ind. App. 422, 293 N.E.2d 210.

Subsection (A) of the rule restricts the bringing or defending of an action as a class to one or more members of the class. *Bailey v. Patterson* (1962), 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512. It then enumerates four essentials to *all* class actions:

(1) The class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

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for the benefit of a class under this section and the court may apportion such recovery among different attorneys.

(E) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

[5] TR 23.1 and 23.2 concern, respectively, derivative actions by shareholders and actions relating to unincorporated associations.

[6] The first, discussed infra, is the hearing requirement specified in TR 23(C)(1). The other is the express provision concerning the allowance of attorney's fees which appears in TR 23(D).

[7] We are, of course, aware of differing interpretations arising among the federal districts. Their very differences are often instructive and provide a cogent basis upon which our court and the Indiana Supreme Court may act in determining the proper construction of the Indiana rule.

Subsection (B) then identifies three separate (although not mutually exclusive) types of class action. Under this section a class action is appropriate if, but only if, in addition to all the requirements of subsection (A) one (or more) of three additional conditions are found to exist. Because the plain language of the rule, TR 23(C)(2) and (3), discussed *infra*, creates substantial distinctions as to notice requirements and opting-out rights concerning other members of the class depending upon whether the class exists under (B)(1), (B)(2), or (B)(3) it is of great importance to the proper maintenance of the action and the validity of its final result that the subsection under which the class exists is properly identified.

A TR 23(B)(1) action is proper where the requirements of TR 23(A) are met and the prosecution of separate actions by or against individual members of the class would create a risk of either

(a) inconsistent or varying adjudications with respect to individual members of the class which would *establish incompatible standards of conduct* for the party opposing the class, or

(b) adjudications with respect to individual members of the class would as a *practical matter be dispositive* of the interest of the other members not parties to the adjudication or *substantially impair or impede* their ability to protect their interests.

Thus, the two alternatives of a (B)(1) type action are defined in terms of the potential effect of the action on either the party, or parties, opposing the class, or the absent members of the class.

With respect to an action under TR 23(B)(1)(a) there must be an actual risk that separate actions will be brought or the action fails to actually "create a risk" of establishing incompatible standards of conduct for the party opposing the class. *Berlin Democratic Club v. Rumsfeld* (D.C.D.C. 1976), 410 F. Supp. 144, 163; 7A C. Wright and A. Miller, Federal Practice and Procedure § 1773, p. 8.

In addition, the action must pose for the party opposing the class the serious risk of a "conflicted position."[8] As Wright and Miller suggest in the section of their treatise referred to above, this

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[8] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (1967), 81 Harv. L. Rev. 356.

implies more than a risk that in separate actions the opposing party would be obliged to pay damages to some class members but not to others. While such results might indeed be inconsistent, they would not necessarily establish "incompatible standards of conduct" for the opposing party. *See Walker v. City of Houston* (D.C. Tex. 1971), 341 F. Supp. 1124. On the other hand, where recovery is to be had from a fund, then the requirements of TR 23(B)(1)(a) might well be met because the difference in results in separate actions could require the opposing party to apply inconsistent distribution plans to the fund, thereby placing him in the exact position the section of the rule was designed to avoid.[9] *Berman v. Narragansett Racing Ass'n., Inc.* (D.C.R.I. 1969), 48 F.R.D. 333.

Concerning the application of TR 23(B)(1)(b), it should be noted that it differs from TR 23(B)(1)(a) in that under this provision it is not necessary to demonstrate the likelihood of separate actions being brought. Moreover, the language of the rule simply necessitates that "as a practical matter" an adjudication concerning those present would be dispositive or impair or impede absent members' ability to protect their interests.

Yet if the only practical effect the action would have on the interests of other members of the class is the stare decisis effect on actions filed in the same jurisdiction, *Larionoff v. U.S.* (D.C. Cir. 1976), 533 F.2d 1167, *aff'd on the merits* 431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48, or the complexity and expense existing if no prior action had been brought, *McDonnell Douglas Corp. v. U.S. Dist. Ct.* (9th Cir. 1975), 523 F.2d 1083, *cert. den.* 425 U.S. 911, 96 S. Ct. 1506, 47 L. Ed. 2d 761, the requirements to maintain the action under TR 23(B)(1)(b) have not been met. *See generally* 7A C. Wright and A. Miller, Federal Practice and Procedure § 1774.

The second type of class action, permitted by TR 23(B)(2), exists where the party opposing the class has acted or refused to act on grounds generally applicable to the class, *thereby making appropriate final injunctive relief or corresponding declaratory relief* with respect to the class as a whole.

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[9] While we do not reach the question or express opinion thereon, we note the possibility that the maximum appropriation language in the Patient Remuneration Act might, through its limitations, in effect create a fund from which those patient-workers otherwise qualified would be required to recover.

Thus, the first two types of action are based upon the type or effect of the relief being sought. This is not the case with the third type. Under TR 23(B)(3) where the requirements of TR 23(a) are met, the court may permit a class action if it finds,

> "... that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, *and* that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The rule then specifies four (4) matters pertinent to the propriety of maintaining this type of class action which the court should consider in making its findings: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action.

The significance of carefully differentiating among the three types of class action becomes apparent when one contemplates the next section of the rule.

TR 23(C)(2) provides that in any class action maintained *under subdivision* (B)(3) the court shall direct to the members of the class "the best notice practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort*. This subsection proceeds to give all such members of the potential class the right to opt out of the litigation if they so request within a time fixed by the court.

Two additional important consequences attend this provision of the rule. In *Eisen IV, Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732, the Supreme Court determined that the plain language of the rule, the Advisory Committee's Note to Rule 23 (which our study commission commended), and the due process principles of *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 require that individual notice must be provided to all members of the class who are identifiable through reasonable effort. 339 U.S. 176. In addition, since the class status is presumptively for the benefit of those seeking to maintain the class, the cost of

providing such notice must initially be borne by those asserting class status. 339 U.S. 178, 179. This interpretation imposing upon the party or parties seeking to establish class status the initial cost of providing the necessary notice has subsequently been clarified by the Court to include the costs of identifying the members of the class, at least where the expense is substantial, and this is true even though the court in the proper exercise of its discretion may determine that the physical activity involved in identifying the members should under the circumstances be performed by the class opponent. *Oppenheimer Fund, Inc. v. Sanders* (1978), 437 U.S. 340, 98 S. Ct. 2380, 57 L. Ed. 2d 253. We adopt the Supreme Court's analysis and interpretation as properly applicable to the Indiana rule.

Although there are some federal decisions to the contrary,[10] the general view is that these notice requirements and opting-out rights afforded by TR 23(C)(2) do not apply to actions maintained under TR 23(B)(1) or (2). *Jones v. Diamond* (5th Cir. 1979), 594 F.2d 997, 1022; *Society for Individual Rights, Inc. v. Hampton* (9th Cir. 1975), 528 F.2d 905, 906; *Ryan v. Shea* (10th Cir. 1975), 525 F.2d 268; *Ives v. W.T. Grant Co.* (2nd Cir. 1975), 522 F.2d 749; *Hammond v. Powell* (4th Cir. 1972), 462 F.2d 1053, 1055; 7A Wright and Miller, *supra* § 1786, p. 143. The plain language of TR 23(C)(2) makes the mandatory notice provision and opting-out rights applicable only to class actions maintained under TR 23(B)(3).[11] The next subsection, TR 23(C)(3), reinforces this interpretation by again distinguishing between actions brought under (B)(1) and (2) and those brought under (B)(3). This section simply provides that in (B)(1) and (2) actions the judgment "whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class." No more is necessary, although concerning (B)(3) actions the court is additionally required to specify or describe those who the court finds included within the

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[10] This view appears to be followed principally by the district courts in New York. *See, e.g., Brandt v. Owens-Illinois, Inc.* (D.C.N.Y. 1973), 62 F.R.D. 160, 171.

[11] Of course, in actions brought under TR 23(B)(1) or (2) the court may, and ordinarily should, order notice to the absent members of the class through its power under TR 23(D)(2) so that those members may seek to intervene and participate in the litigation if they desire. Such notice (TR 23(D)(2)) is not, however, subject to the stringent requirements imposed in *Eisen IV*.

class judgment in compliance with the notice the opting-out rights effected. The obvious implication of this distinction is that the class members in a (B)(1) or (2) action are to be bound without further definition or exclusion.

The section thus provides the court with a valuable touchstone in the often difficult determination of whether a class action is properly maintainable under (B)(1) or (2), especially (B)(1): Are the consequences of maintaining the class action such that the absent members of the class should properly be bound regardless of notice and without option to exclude themselves?

The answer, assuming the other requisites to establishing a class may be found to exist, focuses upon the prerequisite of TR 23(A)(4) that "the representative parties will fairly and adequately protect the interests of the class."[12] It is a question of fact. *Susman v. Lincoln American Corp.* (7th Cir. 1977), 561 F.2d 86, 90. As the Supreme Court stated in *Hansberry v. Lee* (1940), 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22,

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." (citations omitted) 311 U.S. 44, 45.

In *Eisen II, Eisen v. Carlisle & Jacquelin* (2nd Cir. 1968), 391 F.2d 555 the Second Circuit enumerated four considerations for courts in determining whether adequate representation exists for a

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[12] While this requirement should also be carefully observed in a (B)(3) action, greater latitude does exist because of the requirements of notice and the right of absent members to opt out of the action.

plaintiff class. They are quoted by Wright and Miller, *supra*, with approval and we deem them applicable.

(1) Is the *attorney* qualified, experienced, and generally able to conduct the proposed litigation?

(2) Can the likelihood be reasonably eliminated that the litigants are involved in a collusive suit or that the appearing plaintiffs have interests antagonistic to those of the remainder of the class?

(3) Is plaintiff's claim really typical of those of the entire class?

(4) The question is not to be determined on a quantitative basis, i.e., that a small number of claimants cannot adequately represent an entire class.

See also the extensive discussion of these considerations in 7 Wright and Miller, *supra*, § 1765.

Finally, we must make two observations about the procedure provided by the rule for determining the class issues.

TR 23(C)(1) provides,

> "As soon as practicable after the commencement of an action brought as a class action, the court, *upon hearing or waiver of hearing*, shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." (our emphasis)

The companion section of the federal rule is identical except that it omits the emphasized phrase. Thus, the Indiana rule not only plainly expresses a hearing requirement, but being adopted some four years after its federal counterpart, it must be presumed that the framers of our rule intended to change the consequences existing under the otherwise identical federal rule.[13] We conclude that unless waived by the parties, our rule requires the court to conduct a hearing upon whether the action should be permitted as a class action.

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[13] Some decisions have held the federal rule does not mandate a hearing. *See, e.g., Gosa v. Securities Inv. Co.* (5th Cir. 1971), 449 F.2d 1330. *But see Herbst v. Able* (D.C.N.Y. 1968), 45 F.R.D. 451.

Moreover, we find this approach is supported by sound reason. What we have said so far points up the substantial questions that exist in determining the various elements necessary to proper maintenance of a class action and the significance of correctly identifying the type of class action involved. We believe that an adequate hearing is a valuable safeguard against permitting some of these critical considerations from being submerged by the overall magnitude of the issues the litigation seeks to reach. However, we reject the state's assertion that it is incumbent upon the potential class plaintiff at this hearing to establish the likelihood that it will ultimately succeed upon the merits. While some of the decisions prior to *Eisen IV* so held, for the purpose of allocating the burdens of giving notice, the Supreme Court in *Eisen IV* resolved the problem by placing the burden upon the party asserting class status and expressly rejecting consideration of the ultimate merits at this stage as inimical to both the purpose of subsection (C)(1) and the substantial rights of the defendant. 417 U.S. at 178, 179.

Secondly, and with respect to the language of the rule indicating the hearing and determination should be made "[a]s soon as practicable after the commencement of an action..." we are in accord with Judge [now Mr. Justice] Stevens' comment in his dissent to *Sprogis v. United Air Lines* (7th Cir. 1971) 444 F.2d 1194, 1207, *cert. den.* 404 U.S. 991:[14]

> "At a minimum, this rule requires the class to be defined before the merits of the case have been decided.... A procedure which permits a claim to be treated as a class action in plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair."

This, of course, is the resultant effect in TR 23(B)(3) actions where notice and the opportunity to opt out occur after a determination on the merits. There is even a more subtle disadvantage that may affect absent class members. Apparent determinations on the merits may cause them to opt in or out of the litigation and accept or reject the adequacy of existing representation in circumstances where the apparent determination of merits is erroneous or defective

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[14] The view was adopted by the district court on remand (D.C. Ill. 1972), 56 F.R.D. 420, and has subsequently been accepted by the Seventh Circuit, *Peritz v. Liberty Loan Corp.* (7th Cir. 1975), 523 F.2d 349.

but they are thenceforth committed to their chosen status as a part of the class.

Turning to the case before us it is apparent that the court erred in entering its class determination order as a partial summary judgment without conducting a hearing when the state had not waived hearing.

From the findings entered by the court we are unable to determine whether the court attempted to distinguish between the three types of class action provided by TR 23(B), although some of the findings and order appear to indicate that action under TR 23(B)(3) was contemplated.[15] If so, then the court further erred by not directing individual notice to all of the members of the class that could be identified through reasonable effort, and in failing to impose the expense of providing the same upon the plaintiffs. (During oral argument it was suggested that the state desired to preserve the confidentiality of the identity of these patients. While under such circumstances and upon due consideration the court might well determine that approach to be a proper protective device, the costs of giving the notice should nevertheless be advanced by the class. *Oppenheimer Fund, Inc., supra.*)

Moreover, we must observe that the device sought to be employed by the court in directing the appointment of a guardian ad litem at each institution to receive notice and protect the interests of all patient-workers therein was inadequate. As the court's own order recognized, not all such patients are legally incompetent to handle their affairs,[16] and IC 16-14-1.6-4 expressly provides that all persons receiving mental health services are entitled to exercise their constitutional, statutory and civil rights except for those rights which have been denied or limited by an adjudication or finding of incompetency in a guardianship or other civil proceeding. Moreover, many of such patients to doubt have regularly appointed guardians of the estate in whom is reposed the exclusive authority

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[15] While the form of order directed notice to absent members of the class, the proposed notice which is referred to in the order does not appear in the transcript. As the order, itself, is silent on the point, we do not know whether the absent members of the class were to be given the right to opt out.

[16] For example, Fort Wayne State Hospital and Training Center is authorized to serve epileptic or paralytic children and New Castle State Hospital is maintained for the treatment of epileptics. IC 16-15-5-2, IC 16-14-21-1.

to bring actions against third persons where it is sought to benefit the ward's estate. IC 29-1-18-37.

From what has been said herein concerning the history of the Patient Remuneration Act and the possibility of claims arising outside the act as disclosed by the current state of the pleadings, we are unable to say whether or not the broad class initially defined by the court is a proper one, or whether as drawn the action fails to meet the requirements of TR 23(A)(3) and (4).

V. Other Issues

Finally, we come to the issues pertaining to the merits determined by the court's partial summary judgment. In doing so we are mindful of what has already been said of the necessity of making the class action determination prior to adjudication of the merits of the case. We note that to preserve the vitality of that requirement, if the merits of the case have been substantially determined in a TR 23(B)(3) action before the class determination is made and the opt out rights afforded, the only effective remedy may be to deny class action status and permit the action to proceed only as to the claims of the individual plaintiffs before the court. *Peritz v. Liberty Loan Corp.* (7th Cir. 1975), 523 F.2d 349.

The court's grant of partial summary judgment on February 16 additionally adjudged that "the members of the class are entitled to be paid for all of their labor performed for the defendants, at least to he gross amounts specified in the Patient Remuneration Law, after April 1, 1972."

As the findings entered by the court make quite clear, this determination actually adjudicated two separate issues. It determined (a) that the plaintiffs were excused from failing to exhaust the administrative remedies provided by IC 16-13-12.8-9 (a defense asserted by the state and presented in its cross motion for partial summary judgment); and, further (b) that all members of the plaintiff class were entitled to be paid for all labor performed for the defendants.

Simply stated, the doctrine of the exhaustion of administrative remedies provides that before a court may take subject matter jurisdiction over a class of cases for which a statutory remedy exists, it must be shown that the statutory provisions are inadequate in protecting and preserving the substantive rights of the parties.

Decatur Co. R.E.M.C. v. Pub. Svc. Co. (1971), 150 Ind. App. 193, 275 N.E.2d 857. Thus, where the statute under which an action arises provides a remedy through administrative review, a civil action will be subject to dismissal if the complaining party has failed to avail himself of the administrative remedy. *Amburgey v. Miller* (1977), ___ Ind. App. ___, 362 N.E.2d 869.

There are, however, several well recognized exceptions to the rule of dismissal. The rule will be departed from in extreme cases, where compliance with the rule would be futile, where the statute is charge to be void on its face, or where irreparable injury would result. *Indiana High School Athletic Ass'n. v. Raike* (1975), 164 Ind. App. 169, 329 N.E.2d 66, 82.

The principal problem with the court's determination that the plaintiffs were relieved from the requirement of exhaustion because the remedy provided was futile is that such determinations generally depend upon the facts and circumstances of the given case and thereby are usually unavailable for disposition by summary judgment. Thus, the materials before the court were sufficient to support denying the state's motion on the grounds that pursuing the administrative remedy might have been futile. On the other hand, they were insufficient to establish the futility as a matter of law. In determining no administrative remedy was available, the court's findings rely heavily upon the failure of the state to promptly establish the Patient Remuneration Board and adopt a patient remuneration schedule. However, the materials on file and before the court indicate that these failures were corrected long before the compliant was amended to assert a claim under the statute. Thus, a question exists as to whether any initial problem was cured in time that the statutory remedy thus made available should have been pursued. In addition, under the broad class to which the court applied its determination, many members may have performed the services in question only after the board was operating and a schedule adopted by it.[17] We do not mean to imply that the individual plaintiff Hartnett or the members of a proper class, if one is found to exist, had an adequate administrative remedy. We do hold simply that as determined in the court's order, the finding was

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[17] Approached from the other direction, these matters raise issues which should properly be examined in any class action determination.

premature, at best.

The same must be said of that part of the order determining that all patients are entitled to be paid for all labor performed. It is not disputed by the state and the materials before the court are sufficient to establish that literally hundreds of patients at the various state hospitals have performed services while in a patient status throughout the years. On the other hand, concerning potential constitutional claims, nothing in the record establishes that such services were sufficiently compelled to constitute a taking.[18] As to claims under the statute, at its effective date it only purported to cover service or work performed in an employee-employer relationship and contained an express exception for therapeutic work assignments. IC 16-13-12.8-1(h), 7.The materials before the court do not resolve the problems arising therefrom and, in fact, appear to preclude entitlement to pay for all labor performed.

Accordingly, we determine that the summary judgment was in error and must be reversed in its entirety. As it thus appears that the merits have not been determined prior to class determination, there is no need to invoke the remedy of *Peritz*, *supra*.

The summary judgment is reversed and the cause is remanded to the trial court for further proceedings consistent herewith.

Reversed and remanded.

HOFFMAN, J. and STATON, J. concur.

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[18] Plaintiff Hartnett filed an affidavit asserting compulsion, and the state filed a counter-affidavit denying any compulsion.

APPENDIX E

IN THE SUPREME COURT OF INDIANA

EVAN BAYH, as Governor of the State of Indiana, JERRY THADEN, as Commissioner of the Indiana Department of Mental Health, and THE INDIANA PATIENT REMUNERATION BOARD,	)	
Appellants (Defendants Below),	)	No. 37S03-9106-CV-437
v.	)	in the Supreme Court
LEO SONNENBURG, GERALD HARTNETT, and DENNIS SHEFFIELD, on behalf of themselves and all other similarly situated persons,	)	No. 37A03-8801-Cv-4 in the Court of Appeals
Appellees (Plaintiffs Below),	)	

APPEAL FROM THE JASPER CIRCUIT COURT
The Honorable William W. Andersen, Jr., Special Judge
Cause No. C-44-88
On Petition for Rehearing

ORDER DENYING PETITION FOR REHEARING

Appellees having filed a Petition for Rehearing on July 2, 1991, the Court has reviewed the briefs in support of the Petition and in opposition to it.

Review of the petition does not reveal any grounds for rehearing, though it does suggest a considerable change in emphasis with respect to appellees' claim under the thirteenth amendment to the United States Constitution. This claim occupied just five pages in appellees' 208-page brief before the Indiana Court of Appeals and was barely mentioned in the papers filed before this Court. On rehearing, however, it has moved to the head of the list.

Appellees' renewed vigor in presenting their thirteenth amendment claim moves us to observe that thousands of the hours of work for which appellees claim compensation were performed by patients who requested voluntary commitment to the state's institutions. Surely these voluntary patients cannot be said to have been subjected to involuntary servitude. We are satisfied that this Court's opinion correctly rejected appellees' thirteenth amendment claim both as to voluntary and involuntary patients.

There being no grounds for rehearing, appellees' Petition for Rehearing is hereby DENIED.

DONE at Indianapolis this 17th day of September, 1991.

s/_____

Randall T. Shepard
Chief Justice of Indiana

Shepard, C.J., DeBruler, Givan, and Krahulik, J.J., concur.
Dickson, J., dissents without opinion and would grant rehearing.

APPENDIX F

FAIR LABOR STANDARDS ACT
TITLE 29, U.S. CODE

§206. Minimum wage. (1970)

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter

* * *

§216. Penalties; civil and criminal liability (1988)

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

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